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PREFACE

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JOHN LAWRENCE

Judge Advocate General

1777–1782

On 10 April 1777 Colonel John Lawrence succeeded Colonel William Tudor as Judge Advocate General of the Army. Colonel Lawrence was born in Cornwall, England, in 1750. In 1767 he left England. After his arrival in New York, in this same year, he began the study of law in the office of Lieutenant Governor Colden. In 1772 he was admitted to the New York City Bar where he quickly attained eminence.

In 1775 he married Elizabeth MacDougall, daughter of Major General Alexander MacDougall of the Continental Army. In August of this same year he was commissioned a 2nd Lieutenant in the 4th New York Regiment of the Continental Army. During the War of Independence he served both as aide-de-camp to General Washington and as a staff officer on General Washington's staff, prior to his appointment as Judge Advocate General.

Colonel Lawrence prosecuted some of the most important military trials of the Revolutionary War. In the summer of 1778 he was judge advocate of the general court-martial of Major General Charles Lee for misbehavior before the enemy and disrespect to General Washington at the battle of Monmouth Courthouse. In the following year he conducted the presecution in the court-martial of Major General Benedict Arnold for misconduct. The reprimand received from General Washington as the result of this court-martial so embittered Arnold that it led to his betrayal of the American cause.

In September 1780 he was recorder of the board of officers (precursor of the modern military commission) which investigated the case of Major John André, Adjutant General of the British Army. This commission recommended Major André's execution for spying and conspiring with Arnold for the surrender of West Point.

On 3 July 1782 Colonel Lawrence resigned his position and entered the practice of law in New York City. He distinguished himself in this field and was considered a leading authority on admiralty law. A public spirited citizen, he served as a vestryman

of Trinity Church of New York City, Trustee of Columbia College (now Columbia University), Reagent of the University of the State of New York, and a director of the Bank of the United States.

During the period 1785–1787 he was a delegate to Congress under the Articles of Confederation. However in 1788 he was superseded in this office as a consequence of his spirited advocacy of the adoption of the Federal Constitution. In 1789 while a member of the state legislature he was elected the first representative from New York City in the First United States Congress and he also served in the Second United States Congress. In 1794 he became one of the first of the judges that were appointed for the United States District Court of New York. In 1796 he resigned from the bench as a result of his being chosen United States Senator from New York. In 1798 he served as President pro tempore of the United States Senate.

Colonel Lawrence was a close personal friend of General Washington and Alexander Hamilton. In November of 1810 he died in New York City.

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HEADQUARTERS
DEPARTMENT OF THE ARMY
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MILITARY LAW REVIEW

PRETRIAL RIGHT TO COUNSEL*

BY MAJOR JOHN F. CHRISTENSEN**

I. FEDERAL PROSECUTIONS—PRIOR TO APPEARANCE BEFORE COMMISSIONER

A. *BEFORE ARREST*

A person who expects to be charged with a crime, or who has been indicted but not yet arrested, has complete freedom to seek the advice of a lawyer. The lawyer, in addition to advising him of his rights, may properly advise his client to remain silent after his arrest.[1] Thus even though the right to consult with counsel prior to appearance before the magistrate has not generally been recognized, there are a certain number of cases where prosecuting officials are powerless to prevent the accused from receiving advice from his counsel.

B. *PROMPT APPEARANCE REQUIREMENT*

If a person is lawfully arrested with or without a warrant he must be taken without unnecessary delay before the nearest available United States commissioner.[2] Appearance before the commissioner may be delayed for routine administrative procedures such as booking and fingerprinting, but may not be further delayed to permit interrogation by the police.[3] The police certainly have no duty to delay the ordinary administrative steps because the accused asks to have an opportunity to call his counsel to the police station. His rights are protected by prompt appearance be-

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** JAGC, U.S. Army; Office of the Chief of Legislative Liaison—Office of the Secretary of the Army; LL.B., 1950, University of San Francisco; Member of the Bar of the State of California and of the United States Supreme Court, the United States Court of Appeals, Ninth Circuit, the United States District Court, Northern District of California, and the United States Court of Military Appeals.

1 See Spano v. New York, 360 U.S. 315 (1959) (by implication); Watts v. Indiana, 338 U.S. 49, 59 (1949) (dissenting opinion).

2 FED. R. CRIM. P. 5.

3 Mallory v. United States, 354 U.S. 449, 453 (1957) (dictum).

fore the magistrate. The lawyer who accompanies the accused to the police station may be prevented, despite the accused's objection, from being present during the simple administrative procedures[4] even though incriminating statements made during this period have been held admissible at the trial.[5] The justification for exclusion of counsel at this time is that the arrest and subsequent administrative actions are in no way proceedings against the accused. He is not entitled to impose upon the government the burden of assuring that he has a continuous chaperone.

There are situations where the appearance before the commissioner is delayed beyond the time required for normal administrative procedures. The delay need not necessarily result in an illegal detention if no commissioner is immediately available[6] nor if the police are merely verifying a story volunteered by the accused.[7] The delay will result in illegal detention if the police deliberately delay in order to interrogate the accused.[8]

If the limitation on police detention imposed by Rule 5a is strictly observed, there is little opportunity for interrogation of a suspect before he is warned of his rights by a commissioner. However, in addition to interrogating a suspect during the judicially sanctioned delays after arrest,[9] the police commonly question individuals without making an "official" arrest.[10] A person who accompanies a police officer upon request and voluntarily submits to questioning is not under arrest.[11] On the other hand, a person who has been detained for questioning against his will *is* under arrest, no matter what it might be called.[12] In the absence of statute[13] the police are not authorized to detain a person for interrogation without arrest. In *Culombe v. Connecticut*,[14] Mr.

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[4] *Cf.* notes 30–32 *infra* and text accompanying.

[5] See Heideman v. United States, 259 F.2d 943 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959).

[6] Porter v. United States, 258 F. 2d 685 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 906 (1959).

[7] Mallory v. United States, 354 U.S. 449, 455 (1957) (dictum); Goldsmith v. United States, 277 F.2d 335, 343 (D.C. Cir. 1960) (dictum), *cert. denied*, Carter v. United States, 364 U.S. 863 (1960).

[8] Mallory v. United States, 354 U.S. 449 (1957).

[9] See cases cited, *supra*, notes 6, 7.

[10] ". . . Arrests 'on suspicion' where there is no specific charge, arrests without booking, and roundups of suspicious characters or individuals with prior arrest records are very common. . . ." TAPPAN, CRIME, JUSTICE AND CORRECTIONS 283 (1960).

[11] Williams v. United States, 189 F.2d 693 (D.C. Cir. 1951).

[12] Compare Bennett v. United States, 104 F.2d 209 (D.C. Cir. 1939). See also DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND, 68 (1960).

[13] There is no federal statute authorizing detention for investigation.

[14] 367 U.S. 571 (1961).

Justice Frankfurter wrote: ". . . In the United States 'interrogation' has become a police technique, and detention for purposes of interrogation is a common, although generally unlawful, practice. . . ."[15] Although *Culombe* was a state prosecution, the opinion ranges widely and covers federal criminal practice. Mr. Justice Douglas believes that federal officers violate the prompt appearance rule: "While the McNabb rule is ideal, it is, I fear, not greatly respected in practice. Detention of suspects for secret interrogations continues both at the federal and the state level."[16]

C. *CONSTITUTIONAL BASIS APART FROM INTERROGATION*

1. *Habeas Corpus.*

Assuming there is detention without interrogation, does the accused have the right to call a lawyer and then to speak to him when he arrives at the jail? This involves one aspect of the problem of whether the accused can be held incommunicado.[17] The *United States Constitution* provides, "The privilege of the Writ of Habeas Corpus shall not be suspended. . . ."[18] Habeas corpus is the procedure by which an accused tests whether his arrest and detention is based upon probable cause as required by the Fourth Amendment. An accused who is held incommunicado cannot assert his right to habeas corpus—as to him the privilege of the writ is for all practical purposes suspended while he is so held. The right to test the legality of the detention being a constitutional guarantee which is violated by delay, the accused must be permitted to institute habeas corpus proceedings at the earliest moment practicable after arrest. In order effectively to sue for a writ, he must be allowed to see his counsel at the police station. The right to counsel for this purpose must not be thwarted by invoking what at another time would be a reasonable limitation on the right to have visitors.

While the protection of the Writ of Habeas Corpus carries with it the right to the assistance of counsel at the first opportunity after arrest or detention, there is the problem of finding an effective remedy. There is no reported case holding that charges must be dismissed because of denial of the right effectively to test the

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[15] *Id.*, at 572–73, authorities cited at 573, n.5. See also, Foote, *Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 20 (1957); Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473 (1955); Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 298 (1945).

[16] DOUGLAS, THE RIGHT OF THE PEOPLE, 156 (1958).

[17] "Incommunicado" also involves the coercive effect of interrogation without the support of counsel. See cases cited *infra*, note 20.

[18] Art. I, § 9, Clause 2.

legality of the detention. A civil cause of action for money damages would seem to be available but this remedy has generally proved ineffective.[19]

The incursion of individual civil liberties encompassed by the phrase "being held incommunicado" has not been directly condemned, but has increasingly come under fire by the Supreme Court in the collateral matter of whether the accused's confession meets due process standards of the Fourteenth Amendment.[20] Denial of counsel has been treated as one factor tending to show coercion. No case has yet held that being held incommunicado is alone sufficiently coercive to render a statement inadmissible.

2. *Trial Preparation.*

The Sixth Amendment guarantee of assistance of counsel for the defense of a criminal charge has been held to include a reasonable opportunity to consult with counsel and prepare for trial.[21] No point in the pretrial proceedings has been specified as the time when counsel may first consult with the accused in order to begin his trial preparation. Logically, preparation for trial might begin immediately after arrest. If the accused is merely waiting in a detention cell there is no reason to say that he is not available for consultation. To deny him the assistance of counsel to prepare his defense while police investigation continues must be held to violate the Sixth Amendment. In most cases demonstrable prejudice to the accused's ability to prepare for trial will not be shown by denial of the assistance of counsel for a short time at this early stage. It is unlikely that the Supreme Court will reverse in this situation without testing for prejudice.[22]

D. *CONSTITUTIONAL BASIS—INTERROGATION CONSIDERED*

1. *Police Questioning Generally.*

Wholly apart from the right to the assistance of counsel on general grounds, the right may arise because the suspect is personally involved in the investigative process. In the course of an

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[19] See Foote, *Tort Remedies for Police Violation of Individual Rights*, 1 MINN. L. REV. 493 (1955).

[20] See, *e.g.*, Fikes v. Alabama, 352 U.S. 191 (1957); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949).

[21] See Chandler v. Fretag, 348 U.S. 3, 10 (1954); Powell v. Alabama, 287 U.S. 45 (1932). See also Crooker v. California, 357 U.S. 433, 441 (1958) (dissenting opinion).

[22] *Cf.* Hamilton v. Alabama, 368 U.S. 52 (1961). Compare Crooker v. California, 357 U.S. 433 (1958).

investigation he may be requested or told to perform a variety of acts. For example he may be asked to answer questions, requested to provide bodily fluids or told to appear in a line up for identification. In any of these situations the advice of counsel may be critically needed. The effect of police questioning upon the right to assistance of counsel will be considered as the most common example.

For purposes of analysis, police questioning can be separated into interviews and interrogations.[23] The *Army Field Manual on Criminal Investigation* defines the terms as follows:

> (1) *Interview.* In the interview, the investigator, in general, limits his questioning to permit the person interviewed to tell in his own way his knowledge of the matter of which he is being interviewed. . . . In general, such method is most frequently appropriate when questioning complainants, witnesses, victims and such who are themselves without culpability as to an offense under investigation and whose attitudes are those of free and willing cooperation.
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> (2) *Interrogation.* In interrogation the investigator engages in a process of extractive questioning. That is, the investigator, much more so than in the case of the interview, controls the responses of the person being questioned by the form and content of the questions asked. Thus, the investigator minutely governs the course of information being obtained through asking questions in detail and requesting specific, pertinent responses. Such questioning technique is more usually applied to persons suspected or accused of an offense or to unwilling witnesses.[24]

The police have the right to interview anyone so long as no restraint is imposed.[25] However, there is no requirement for either the innocent or the guilty to give any answers. In regard to the "citizen's duty" to reveal offenses, Chief Justice Marshall said:

> It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge, but the law which would punish him in every case for not performing this duty too harsh for man.[26]

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[23] See Mueller, *The Law Relating to Police Interrogation, Privileges and Limitations*, POLICE POWER AND INDIVIDUAL FREEDOM 131, 133 (Sowle ed. 1962).

[24] UNITED STATES DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 19–20, MILITARY POLICE INVESTIGATIONS, para. 42*b*(1), (2) (1961). See Mueller, *supra* note 23, at 133.

[25] Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, POLICE POWER AND INDIVIDUAL FREEDOM 11, 14 (Sowle ed. 1962); Mueller, *supra* note 23, at 132.

[26] Marbury v. Brooks, 20 U.S. 556, 575–76 (1822). Misprison of a felony is an offense provided in 18 U.S.C. § 4, but mere silence after knowledge of the crime is not sufficient to establish the "concealment" element of the crime. Bratton v. United States, 73 F.2d 795, 798 (10th Cir. 1934).

Since the person being interviewed can refuse to answer any questions and is under no sort of restraint, it follows that he can cause counsel to be present simply by refusing to have it any other way. Of course if he is guilty there is a strong psychological compulsion to seek to avoid an inference of guilt which might arise from silence. "[A]nyone who is innocent must recognize a strong moral duty to assist the police by giving all the information in his power, and anyone who is guilty must accept the same duty if he wishes to be thought innocent."[27]

2. *Sixth Amendment.*

A period of questioning is an "interview" or an "interrogation" depending upon the state of mind of the questioner. If he suspects the subject, he conducts an interrogation to extract a confession, otherwise he interviews him. The distinction between interview and interrogation is significant because interrogation is essentially a proceeding against the accused. If the interrogation stage has been reached, the situation could well be considered to be a "step in the proceedings against him" included within the ambit of the Sixth Amendment guarantee of counsel.[28] The Supreme Court has not held that the Sixth Amendment guarantee of counsel applies to the interrogation stage of the proceedings, but a minority of the Court believe that it does.[29] If the Sixth Amendment is applied, then it follows that the accused has the right to consult counsel before an interrogation can proceed. Application of the Sixth Amendment would not seem to require counsel's presence throughout the interrogation but the question is open to doubt. Counsel may be excluded from a grand jury hearing,[30] a coroner's inquest,[31] or an administrative investigation.[32] However, it may not be concluded that counsel can be excluded from all interrogations, particularly if failure to answer will subject the witness to prosecution for contempt.[33] There is the possibility

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[27] DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 27 (1960).

[28] *Cf.* Powell v. Alabama, 287 U.S. 54, 69 (1932) (dictum). *But see* United States v. Killough, 193 F. Supp. 905, 917–920 (D.C. 1961), *rev'd on other grounds*, 315 F.2d 241 (D.C. Cir. 1962).

[29] See Culombe v. Connecticut, 367 U.S. 571, 637 (1961) (concurring opinion by Douglas, J.).

[30] In re Black, 47 F.2d 542 (2d Cir. 1931); *cf.* In re Groban, 352 U.S. 330, 333 (1957) (dictum) (state agency).

[31] See United States v. Killough, 193 F. Supp. 905, 920, n. 48, 49 (D.C. 1961), *rev'd on other grounds*, 315 F.2d 241 (D.C. Cir. 1962).

[32] *Cf.* Anonymous v. Baker, 360 U.S. 287 (1959); In re Groban, 352 U.S. 330 (1957).

[33] *Cf.* In re Groban, 352 U.S. 330, 337 (1957) (dissenting opinion). *But cf.* Anonymous v. Baker, 360 U.S. 287 (1959) (state investigation).

of creating a procedure between the extremes of exclusion of counsel and his participation as his client's advocate.[34]

3. *Denial of Due Process.*

In Federal prosecutions the courts have excluded coerced confessions more by relying upon rules of evidence than upon any constitutional provision.[35] The Supreme Court's minimal standard for voluntariness of confessions is imposed upon the states through the due process clause of the Fourteenth Amendment.[36] A holding that state action has violated the due process clause of the Fourteenth Amendment justifies a conclusion that similar federal action would offend against Fifth Amendment due process. A federal due process violation might be more specifically condemned by another section of the Bill of Rights. Denial of the assistance of counsel is a good example of conduct proscribed by both the Fifth and Sixth Amendments. Although in federal prosecutions the courts are apt to speak of denial of the assistance of counsel solely in terms of a Sixth Amendment violation, it may be helpful to view the problem from the fundamental fairness aspect of due process.

Due process logically applies to exclude coerced confessions and more generally to prevent any pretrial unfairness from tainting the trial. In *Crooker v. California*,[37] the Court distinguished between denial of counsel as a factor affecting voluntariness of a confession and the denial as prejudicial to the fundamental fairness of the subsequent trial.[38] No indication was given as to when the trial might be so infected other than by the improper admission of an involuntary confession. The court said:

> . . . [S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at the trial on the merits . . . but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice.[39]

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[34] See Haley v. Ohio, 332 U.S. 596 (1948), wherein Justice Douglas wrote a majority opinion in which the absence of counsel was shown to be an important factor in holding a confession to be coerced. However, certain language indicates that the lawyer was seen more as a referee than as an advocate. The court said ". . . No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. . . ." 332 U.S. at 600. See also Reck v. Pate, 367 U.S. 433, 444 (1961) (concurring opinion by Douglas, J.).

[35] See Wilson v. United States, 162 U.S. 613 (1895); Davis v. United States, 32 F.2d 860 (9th Cir. 1939).

[36] Note 20 *supra*.

[37] 357 U.S. 433 (1958).

[38] Compare Reece v. Georgia, 350 U.S. 85 (1955).

[39] Crooker v. California, 357 U.S. 433 (1958) (dictum).

The court found there was no prejudice because the confession was voluntary and the accused knew of his right to keep silent.

The holding in *Crooker* has been construed to mean that prejudice is shown only if it is established that the suspect did not know of his right to remain silent in the face of questioning.[40] Under this interpretation, the suspect has no constitutional right to the advice of a lawyer if he is aware of his right to refuse to answer questions. Moreover, his very request for counsel is an indication that he is aware of his rights and therefore not entitled to counsel.[41] The *Cicenia*[42] case supports this view because the accused had consulted counsel before the interrogation. Refusing his requests to see his lawyer might not be prejudicial because he was presumably advised of his rights before he surrendered.

If the *Crooker* case requires only that the suspect be aware of his rights, then the lawyer can properly be excluded from the interrogation. It might be possible for the police to satisfy the requirement by giving a proper warning themselves. In either event the burden is upon the government to establish that the accused knew of his right to remain silent.[43]

A note of caution is required in regard to the foregoing restrictive interpretation of *Crooker* and *Cicenia*. Firstly, there is the statement in *Cicenia:*

> We share the strong distaste expressed by the two lower courts over the episode disclosed by this record. . . . Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. See McNabb v. United States, 318 U.S. 332.[44]

Presumably exercise of the supervisory power would require prompt appearance before the commissioner who would allow the attorney to see the client upon request. Secondly, the position of

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[40] See Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960), *cert. denied*, 364 U.S. 941 (1961); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, POLICE POWER AND INDIVIDUAL FREEDOM 153, 178 (Sowle ed. 1962).

[41] Compare Griffith v. Rhay, *supra* note 40. In this case admissions obtained during an interrogation were held to violate due process, because of prejudice to the accused arising from the lack of counsel—there being no indication that he was aware of his rights. His failure to request counsel was not treated as a waiver because there was no indication that he intelligently waived the right.

[42] Cicenia v. LaGay, 357 U.S. 504 (1958).

[43] Compare Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). The United States Court of Military Appeals has demanded an affirmative showing of the warning of the right to remain silent required by the UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ], Art. 31(*b*). See United States v. Josey, 3 USCMA 767, 14 CMR 185 (1954).

[44] 357 U.S. 504, 508–509.

the four dissenters cannot be ignored as they may well now represent the majority opinion.[45] Justice Douglas wrote: "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."[46] The dissent does not clearly state whether the suspect is entitled to the presence of counsel throughout the interrogation.[47] Thirdly, turning the majority opinion in *Crooker* and *Cicenia* solely on the issue of knowledge of the right not to answer questions may be too narrow a construction of the broad language used. In any factual situation the majority opinions could be applied to condemn a denial to counsel merely by finding prejudice. *Crooker* might end by being restricted to its peculiar facts without being expressly overruled.[48]

4. *Privilege Against Self-Incrimination.*

A final possible basis for a suspect's right to counsel before or during interrogation is the privilege against self-incrimination under the Fifth Amendment. The argument is that only a defense counsel can properly advise the suspect of his rights because he is entitled to more than information. It is urged that he is entitled to the assistance of counsel particularly upon the question of whether he should make any statement.[49] In theory this requirement would be satisfied even if the lawyer were excluded from the interrogation room.

E. *EFFECT OF RECOGNITION*

There is ample constitutional basis to hold that any person confronted by the police has a right to consult retained counsel. The right is strengthened, rather than diminished, if that person is

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[45] The dissenters, Chief Justice Warren, Justices Black, Douglas and Brennan are still on the court but only two of the majority remain—Justices Clark and Harlan. The alignment was the same in *Cicenia* except Justice Brennan did not participate. In Callegos v. Colorado, 370 U.S. 49 (1962), the dissenters in *Crooker* became a four to three majority, Justices Frankfurter and White not participating. The court avoided overruling *Crooker*, holding that due process requires that very young persons *must* consult counsel or at least a friendly adult prior to interrogation even if there is no request.

[46] Crooker v. California, 357 U.S. 433, 441 (1958) (dissenting opinion).

[47] The four *Crooker* dissenters also dissented in *In re* Groban, 352 U.S. 330 (1957), and in Anonymous v. Baker, 360 U.S. 287 (1959), where they would have permitted counsel throughout the interrogation. But those cases are distinguished because the interrogator was empowered to punish for contempt.

[48] This process has already begun. See Gallegos v. Colorado, 370 U.S. 49 (1962).

[49] *Cf.* United States v. Killough, 315 F.2d 241 (D.C. Cir. 1962).

arrested or detained. The right is still further reinforced if the arrested suspect is subjected to interrogation. It must be conceded, however, that there are no decided cases holding directly that the police must afford an opportunity to consult with counsel prior to appearance before a commissioner. The issue is usually avoided or treated ambiguously.[50] Even the *Crooker* case may be explained on the basis that the Court recognized the right to counsel but refused to adopt a rule which would nullify the trial proceedings without testing for prejudice.

The factor which has limited the development of a fully recognized right to counsel in the pretrial area is concern about the effect this may have upon present police practices. The police practice most seriously in danger is that of interrogation of suspects. The fear expressed is that interrogation is necessary for the solution of so many crimes and that any impairment of the practice would constitute a direct and immediate danger to the general public safety. Thus the court in *Crooker* rejected the argument that every denial of a request to consult with counsel requires reversal of the conviction. The court said that the defendant's argument would have a "devastating effect on the enforcement of criminal law, for it would preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney."[51] The reason advice of counsel is believed effectively to preclude police questioning is because counsel will go beyond a mere recitation of the right not to answer questions and will advise his client to keep his mouth shut.[52]

Broad predictions of intolerable breakdown of the administration of criminal justice if there is any alteration in the present police practice should be carefully tested for accuracy before they are finally accepted. The gloomy prophecies invariably come from police and prosecutors. To rely solely upon the police view violates the basic proposition that no man should judge his own cause. Objective studies are badly needed to determine the factual validity of the police claim that present practices are absolutely necessary.[53]

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[50] The charge of ambiguity has also been made in connection with the related problem of the right of police to detain and question without formal arrest. Remington, *supra* note 25 at 15–16.

[51] Crooker v. California, 357 U.S. 433, 441 (1958). See also Cicenia v. LaGay, 357 U.S. 504, 509 (1958); Justice Frankfurter's lengthy discussion in Culombe v. Connecticut, 367 U.S. 571 (1961).

[52] In an often quoted concurring opinion Justice Jackson said that any lawyer "worth his salt" will tell his client to say nothing to the police. Watts v. Indiana, 338 U.S. 49, 59 (1949).

[53] See Weisberg, *supra* note 40 at 166–72, for a discussion of several areas recommended for research.

The police probably have overstated their case. Informing a suspect of his rights before questioning is a limitation upon the conduct of the interrogation which has generally been opposed by the police,[54] but military criminal investigators have effectively operated under a system of giving preliminary warnings.[55] Military investigators generally feel that while warning is a nuisance to them, it is very seldom the key factor which persuades an individual not to answer questions. It is worthy of note that the legislation proposed by the Department of Justice to repeal the *McNabb-Mallory* rule contains, as a rather obvious sop to the opposition, a requirement for preliminary warning.[56] It actually appears that the Washington, D.C., police department is having far better success working with the rule than they had expected.[57]

Cases are often reported in which the facts reveal that the accused made a completely voluntary statement after consultation with his lawyer.[58] It is likely that even if advice of counsel were required before every interrogation, the police will obtain about the same number of confessions as they do without granting that protection. Truly voluntary confessions are usually motivated by reasons too powerful to be overcome by advice of counsel to remain silent.[59] If counsel's presence at the police station will prevent coercive tactics by which confessions are now obtained, this is an argument for granting the right, not for withholding it. If the lawyer is permitted to participate in the proceeding as an advocate so as to interpose himself between the police and his client no confession can be expected. On the other hand, even if the right to counsel at interrogation is recognized, few suspects will benefit unless provision is made for appointed counsel.[60]

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[54] See testimony of Police Chief Murray of Washington, D. C., before the 1957 House Committee hearings quoted in Weisberg, *supra* note 40 at 174.

[55] UCMJ, Art. 31(*b*).

[56] See Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1, 38 (1958) (discussing H.R. 11477, 85th Cong., 2d Sess. (1958), the Willis-Keating Bill). United States Attorney David C. Acheson's proposal is reported in The Sunday Star (Washington, D. C.), March 3, 1963, p. A–7, col. 1.

[57] See Weisberg, *supra* note 40 at 167–168.

[58] See, *e.g.*, Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960); United States v. Melville, 8 USCMA 597, 25 CMR 101 (1958); *Cf.* People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825 (1960).

[59] See Weisberg, note 40 *supra* at 168–169, and authorities cited therein concerning the psychological pressure to confess.

[60] See Culombe v. Connecticut, 367 U.S. 571, 641 (1961) (concurring opinion). The Federal rules do not now require counsel to be appointed before arraignment. See FED. R. CRIM. P. 44.

II. FEDERAL PROSECUTIONS—AFTER INITIAL APPEARANCE[61]

A. *PRELIMINARY WARNING*

After arrest the suspect is produced before the United States Commissioner without unnecessary delay.[62] The *Federal Rules of Criminal Procedure* provide:

> Rule 5. Proceedings Before Commissioner
> (b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

The proposed amendment to the Rules adds that the defendant shall be advised "of his right to request the assignment of counsel," and Rule 44 is to be amended to provide for assignment of counsel by the commissioner for the person who is unable to obtain counsel.[63] Under current practice counsel is not assigned to an indigent defendant prior to his arraignment in court.[64]

If a preliminary examination is requested, a reasonable delay must be granted so that retained counsel may be present to assist the accused.[65] Delay is also granted at the request of the United States Attorney so he may gather the evidence to show probable cause. One to two weeks is the usual period of delay.[66] If the defendant does not or cannot take advantage of his right to retain counsel, he is fair game for police interrogators. The man who

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[61] The term "initial appearance" is used to separate the hearing granted by Rule 5 into two parts, first the appearance where warning is given and secondly the probable cause hearing. The term is also used to avoid confusion which might arise from the use of "arraignment." See Goldsmith v. United States, 277 F.2d 335, 338, n. 2a (D.C. Cir.), *cert. denied sub nom.*, Carter v. United States, 364 U.S. 863 (1960).

[62] FED. R. CRIM. P. 5a.

[63] Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (1962), 5b, 44.

[64] FED. R. CRIM. P. 44; Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579 (1963).

[65] See generally MORELAND, MODERN CRIMINAL PROCEDURE, 176 (1959); Orfield, *Proceedings Before the Commissioner in Federal Criminal Procedure*, 19 U. PITT. L. REV. 489, 527–28 (1958).

[66] THE INDIANA STATE BAR ASSOCIATION, FEDERAL COURT PLEADING AND PRACTICE, 335 (1960). See Orfield, *supra* note 65 at 528.

exercises his right to retain counsel is not assured the assistance of counsel at a subsequent interrogation.

B. *INTERROGATION AFTER CONSULTATION WITH COUNSEL*

Two cases arising in the District of Columbia have held that a confession which is obtained during a period of illegal detention is admissible if it is freely affirmed by the defendant after a complete warning by the commissioner.[67] In each case, counsel was requested by the defendant in the commissioner's hearing. In *Goldsmith,* counsel was appointed only for the appearance before the commissioner. He conferred with the defendant for about 15 minutes, but did not attempt to accompany him to the police station even though the municipal judge had signed an order permitting further police interrogation and continued investigation.[68] In *Jackson,* defendant discussed his case with retained counsel who told him to say nothing to the police.[69] Despite this advice the defendant subsequently consented to a police interview.[70]

In neither *Goldsmith* nor *Jackson* did the defendant ask the police officer for permission to consult with counsel before he affirmed the prior statement. The advice of counsel was treated as evidence of the "independence" of the "second" confession from the invalid predecessor. The court approved with no discussion interrogation without counsel being present.

C. *INTERROGATION BEFORE CONSULTATION WITH COUNSEL*

United States v. Killough [71] discusses the right to the assistance of counsel at a police interrogation occurring after an abbreviated preliminary hearing. Killough's initial confession, made during illegal detention prior to the appearance before the magistrate, was inadmissible. In confinement pending continuation of the pre-

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[67] See Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), *cert. denied,* 366 U.S. 941; Goldsmith v. United States, 277 F.2d 335 (D.C. Cir.), *cert. denied sub nom.,* Carter v. United States, 364 U.S. 863 (1960). Judge Fahy dissented in both *Jackson* and *Goldsmith* upon the ground that the affirmation was not independent of the original statement. United States Court of Military Appeals opinions support Judge Fahy's position. See United States v. Powell, 13 USCMA 364, 32 CMR 364 (1962); United States v. Spero, 8 USCMA 110, 23 CMR 334 (1957).

[68] See Goldsmith v. United States, 277 F.2d 335, 339, 346 (D.C. Cir.), *cert. denied,* Carter v. United States, 364 U.S. 863 (1960).

[69] See Jackson v. United States, 285 F.2d 675, 677, note 7 (D.C. Cir. 1960).

[70] See *Id.,* at 677–678.

[71] 193 F. Supp. 905 (D.C. 1961), *rev'd on other grounds,* 315 F.2d 241 (D.C. Cir. 1962).

liminary examination, Killough consented to see the same officer to whom he had previously confessed. They spoke in the rotunda of the jail. The officer knew Killough had stated he intended to retain counsel. When asked, Killough said he did not have counsel but a friend was getting one for him. After conversation about non-incriminating matters, the officer asked if the statement previously made was correct.[72] Killough repeated his earlier confession without further prodding. The trial court found that the confession was not the result of interrogation. The court held that a *spontaneous* post-commitment confession is admissible evidence, even though the defendant had not had an opportunity to consult with counsel.[73]

The Court of Appeals for the District of Columbia sitting en banc reversed the District Court.[74] The court decided five to four that the illegally obtained confession tainted the second confession and reversed without reaching the denial of counsel question. The *Goldsmith* and *Jackson* cases were distinguished on the ground that in those cases the accused had the advice of counsel before the affirming statement was made. Judge Burger, dissenting, said that the majority holding ". . . means in effect, that statements made either *before or after* the hearing are to be excluded unless the statements are made with the defendant's lawyer at his elbow." This overstates the majority position. Nothing in the majority holding changes the rule permitting questions during a period of legal detention prior to the commissioner's hearing. The holding doesn't deal with the propriety of a post-commitment interrogation if there is no prior illegally obtained statement. Finally, the holding does not decide that the defendant must have his "lawyer at his elbow" to validate the second confession; to the contrary, the clear implication is that prior consultation with counsel is all that is required.

From these cases it appears that the rules regarding the right to the assistance of counsel at interrogation after the appearance before the magistrate are: (1) An interrogation must be delayed until the accused consults with counsel if he so requests; (2) After the accused has consulted with his lawyer an interrogation may

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[72] See *Id.*, at 917, note 38.

[73] Also discussed was defendant's argument that Rule 5(b) was meant to provide the assistance of counsel as quickly as possible and "to provide for a hiatus in the process until consultation with counsel had taken place." This argument was rejected. The court relied in part upon the fact that the right is only to *retain* counsel; since consultation with counsel is not demanded in all cases, no hiatus for that purpose need be given in any case. 193 F. Supp. at 914. The proposed amendment to Rule 5(b) provides for appointment of counsel for indigents and will give defendant's argument greater weight.

[74] Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962).

proceed in the lawyer's absence; and (3) A statement which is not the product of interrogation but is volunteered is admissible despite a prior request for the aid of counsel.

III. FEDERAL AND MILITARY PRETRIAL PROCEDURE COMPARED

A. *DETENTION AND APPREHENSION* [75]

"On the street" detention of military personnel for identification and questioning is an authorized practice.[76] If explanation of his actions is unsatisfactory to the military police, the suspect can be apprehended.[77] The test for apprehension is "reasonable belief that an offense has been committed and that the person apprehended committed it."[78] Contrary to Rule 5a of the *Federal Rules of Criminal Procedure*, a military suspect can be detained 24 hours for investigation.[79] There is no statutory authority for a 24-hour period of detention. The code permits custody of an apprehended person only "until proper authority may be notified."[80]

B. *CONFINEMENT*

Under certain circumstances, any officer may confine [81] an en-

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[75] "Apprehension" is the military term synonymous with civilian arrest. UCMJ, Art. 7(*a*); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter cited as MCM, 1951], para. 18*a*. In military usage "arrest" is restraint of a person to specified limits (usually quarters) which may be used in lieu of confinement. UCMJ, Art. 9; MCM, 1951, para. 29*a*.

[76] "DETENTION FOR QUESTIONING

a. Military Personnel. When a person subject to military law is suspected of committing, has committed, or is about to commit an offense under the Article of the UCMJ, he may be questioned as to his identity and in respect to the matter of which he is suspected. Any military person subject to the UCMJ who fails to identify himself or to explain his actions to the satisfaction of the military police may be apprehended and further questioned and investigated. . . . The period of detention for questioning will not be prolonged beyond that time necessary to confirm or refute the suspicion. . . ." UNITED STATES DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 19–15, THE MILITARY POLICEMAN, para. 52a (1959).

[77] *Ibid.*

[78] UCMJ, Art. 7(*b*); MCM, 1951, para. 19*a*.

[79] "TEMPORARY DETENTION

Temporary detention is an interim status between the time a person is taken into custody by military police and his release or the filing of charges against him within 24 hours. This detention is used in respect to persons subject to military law taken into custody under the reasonable belief that the person apprehended has committed an offense." UNITED STATES DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 19–5, THE MILITARY POLICEMAN, para. 57 (1959).

[80] UCMJ, Art. 9(*e*); MCM, 1951, para. 19*d*.

[81] Confinement is defined as "physical restraint," *i.e.*, in prison or a stockade. MCM, 1951, para. 20*d*. Commitment is the federal equivalent.

listed man,[82] but the man's commanding officer most often issues the confinement order. In any event, the immediate commander must be notified within 24 hours.[83] No person shall be ordered into arrest or confinement except for probable cause.[84] Arrest or confinement is not mandatory but is within the discretion of the officer exercising the power.[85] In practice many suspected offenders are restricted to the unit or post during investigation.[86] Thus the company commander has the responsibility to administer pretrial confinement in the military, a duty performed by the commissioner in federal practice.

C. *CHARGES*

When a person is placed in arrest or confinement immediate steps must be taken to inform him of the specific wrong of which he is accused.[87] The commanding officer, having been informed that the accused is in confinement, must determine whether or not to prefer charges.[88] Charges should be preferred promptly, but a reasonable delay is permitted if the accused is not in arrest or confinement.[89] Delay in preferring charges does not operate automatically to release the suspect from restraint.[90] Charges and specifications alleging crimes are signed by a person who swears that he has personal knowledge of, or has investigated the allegations, and that they are true in fact to the best of his knowledge and belief.[91] In federal practice the complaint is substantially the same—a written statement of the essential facts of the crime made upon oath.[92] Any citizen may make a complaint but normally the

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[82] UCMJ, Arts. 9(*b*), 11(*a*); MCM, 1951, paras. 21*g*(2), 20*d*(3). The order of a *commanding* officer is required to arrest or confine an officer, UCMJ, Art. 9(*c*); MCM, 1951, para. 21*a*(1).

[83] UCMJ, Art. 11(*b*); MCM, 1951, para. 20*d*(5).

[84] UCMJ, Art. 9(*d*); MCM, 1951, para. 20*d*(1).

[85] UCMJ, Art. 10; MCM, 1951, para. 18*b*. The discretion of the officer who orders confinement and that of the commanding officer who may order his release is the only military equivalent of the civilian right to bail. In many jurisdictions the staff judge advocate, acting for the commander, must authorize proposed confinement and must periodically review continued pretrial confinement.

[86] MCM, 1951, para. 20*b*, *c*.

[87] UCMJ, Art. 10; MCM, 1951, para. 20*d*(4). Compare, "The Commissioner shall inform the defendant of the complaint against him. . . ." FED. R. CRIM. P. 5(b).

[88] Any person subject to the code may prefer charges but the responsibility to take action lies with the commanding officer. UCMJ, Art. 30; MCM, 1951, paras. 29*b*, 31, 32.

[89] MCM, 1951, para. 25.

[90] MCM, 1951, para. 22.

[91] UCMJ, Art. 30(*a*).

[92] See FED. R. CRIM. P. 3, 5a.

complaint comes from the United States Attorney.[93] In the military the commanding officer must undertake the role performed in federal practice by the United States Attorney.[94]

If the charges are preferred the immediate commander notifies the accused, then forwards them with supporting documents to the officer exercising summary court-martial jurisdiction.[95] If the charges are so serious that the officer exercising summary court-martial jurisdiction considers that he might recommend trial by general court-martial, he will appoint an officer to conduct an investigation pursuant to the *Uniform Code of Military Justice,* Article 32.

D. *COMPARATIVE CHRONOLOGY*

The following chart shows the chronological order of comparable federal and military stages of procedure:

Federal	*Military*
1. Arrest	1. Apprehension
2. Complaint	2. Confinement
3. Initial appearance with commissioner's warning	3. Charges preferred
4. Preliminary examination	4. Accused informed of charges
5. Commitment	5. Article 32, Investigation

It must be noted that the enumerated procedural steps do not correspond. The equivalent stages are: arrest and apprehension; complaint [96] and charges preferred; initial appearance with commissioner's warning and accused informed of charges; preliminary examination and Article 32 investigation; and commitment and confinement.

The order authorizing military confinement occurs much earlier in the procedure than does federal commitment. However, the practice is not significantly different since the commissioner is permitted to commit pending the preliminary examination and military authorities have the duty to release promptly should the Article 32 investigation show no basis for proceeding to trial.

The notable difference in procedure is that the military has nothing similar to appearance before a judicial officer for advice of rights. The company commander is required to inform the ac-

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[93] See Orfield, *The Complaint in Federal Criminal Procedure,* 46 KY. L. J. 7, 12 (1957).

[94] Any person subject to the code (even a prisoner) may prefer charges, see UCMJ, Art. 30, but the commanding officer is usually the person to prefer charges, MCM, 1951, para. 29*b*.

[95] MCM, 1951, para. 32.

[96] The complaint may be made before or after arrest. FED. R. CRIM. P. 3, 5a.

cused of the offense charged against him.[97] Before interrogation he is informed by criminal investigators that he need not make any statement.[98] He cannot waive the requirement for an Article 32 investigation.[99] The military accused receives substantially the same advice as required by federal rule 5b except there is no statutory requirement that a military offender be told he has a right to retain counsel. The extent to which the United States Court of Military Appeals has required advice upon the right to retain counsel will be considered, *infra.*

IV. MILITARY PROSECUTIONS

A. *RIGHT TO COUNSEL—GENERALLY*

A member of the military is as free as his civilian counterpart to seek the advice of counsel before he is taken into custody. Of course, the foregoing statement must be qualified by noting the greater control exercised over military persons. It may be that no pass will be granted for reasons other than to prevent the serviceman from seeing a lawyer.

After apprehension a military accused cannot be held incommunicado.[100] He has the right to consult retained counsel.[101] However, the issue has always been presented in connection with the admissibility of statements obtained from him by police interrogation.

The opportunity for criminal investigators to interview and interrogate military personnel is substantially greater than enjoyed by the civilian police. If the perpetrator of a crime is unknown, one or more suspects can be detained for questioning for as long as 24 hours. If a serious offense has occurred the commanding officer might order confinement on the basis of suspicion rather than upon probable cause, particularly if the suspect seems to be dangerous. The suspect may remain in confinement without charges for five days or even weeks while the police investigation continues. If charges are preferred the police need not refrain from further questioning.

It is common practice to allow a suspect or a witness to return to his unit to eat and sleep and to require him to report to the police station the next morning. In this instance, the person's

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[97] UCMJ, Art. 10.
[98] UCMJ, Art. 31(*b*).
[99] UCMJ, Art. 32; MCM, 1951, para. 34.
[100] See United States v. Acfalle, 12 USCMA 465, 469, 31 CMR 51, 55 (1961).
[101] United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957).

place of duty is, in effect, the interview room. By virtue of the continuous control exercised over military personnel it is relatively simple for criminal investigators to arrange for questioning periods. Although the innocent witness cannot be compelled to answer,[102] he has no protection against the harassment of repeated questioning. Ironically, a suspect is somewhat more protected from abuse than an innocent witness because investigators are restrained by the possibility that a confession will be excluded from evidence. However, the *McNabb-Mallory* rule does not apply to the military[103] and neither prolonged confinement[104] nor repeated interrogation[105] has alone been held to be coercive as a matter of law.

The military suspect is at a double disadvantage. He cannot avoid police questioning, and there is no procedure to tell him of his right to retain counsel. The Court of Military Appeals has ameliorated the procedural shortcoming for the accused *who requests advice.* In *United States v. Gunnels,* the Court said:

> . . . It seems to us to be a relatively simple matter to advise an uniformed and unknowing accused that, while he has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have his counsel present with him during an interrogation by a law enforcement agent.[106]

There are three issues which the court necessarily decided: (1) A suspect has no right to appointed military counsel at an interrogation before charges are filed,[107] (2) A suspect has the right "to have a lawyer of his own selection present to aid him during the questioning by the police officer,"[108] (3) A suspect who requests legal advice has the right to be informed of his right to consult counsel.[109] The staff judge advocate's erroneous refusal to provide proper information to Gunnels was held to preclude any use of a statement subsequently obtained from him.

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[102] Mere refusal to disclose a felony is insufficient to constitute the offense of misprison of a felony. MCM, 1951, para. 213*d*(6)(*a*). See *supra* note 26.

[103] United States v. Moore, 4 USCMA 482, 485, 16 CMR 56, 59 (1954); Burns v. Wilson, 346 U.S. 137, 145, n. 12 (1953).

[104] See United States v. Bayer, 331 U.S. 532 (1947) (Restriction to an air base for six months). *But cf.* United States v. Hogan, 9 USCMA 365, 26 CMR 145 (1958).

[105] United States v. Moore, 4 USCMA 482, 16 CMR 56 (1954).

[106] 8 USCMA 130, 135, 23 CMR 354, 359 (1957). Judge Latimer dissented on the ground that denial of assistance of counsel was merely one factor to be considered in determining the voluntariness of a statement.

[107] United States v. Gunnels, 8 USCMA 130, 133, 23 CMR 354, 357 (1957) (citing United States v. Moore, 4 USCMA 482, 16 CMR 56 (1954)).

[108] United States v. Gunnels, 8 USCMA 130, 135, 23 CMR 354, 357 (1957); Presence of counsel in the interrogation room will be considered, *infra.*

[109] *Ibid.*

The rulings in *Gunnels* that a suspect has no right to appointed military counsel and that he may consult with retained counsel before or during an interrogation have been repeated in several cases.[110] The requirement that a suspect who requests legal advice must be properly informed of his rights has been more troublesome. Unlike Rule 5b of the Federal Rules of Criminal Procedure, a military accused does not receive information as to his right to counsel unless he so requests. While no "magic formula" is required, the request must be plain enough reasonably to inform the interrogators that the right is being asserted.[111]

The wording in *United States v. Gunnels* indicates that it is the duty of the staff judge advocate or one of his assistants to provide the required advice when it is requested of him by the accused.[112] In subsequent cases the Court, although critical of legal advice given by a non-lawyer, refused to hold the advice must emanate from an attorney.[113] It is clear the interrogator may not turn a request for counsel aside by stating that he will act as "legal counsel" for the accused.[114]

The convening authority can assign a military lawyer to assist an accused even though assignment of counsel is not mandatory.[115] It follows that an accused can request the convening authority to be more beneficent than required. The Court has approved advice to an accused that "he could request individual military counsel."[116] However, it is not certain that such information must be provided in every case.

B. *RIGHT TO COUNSEL DURING INTERROGATION*

United States v. Melville involved the question "whether a suspect is entitled to have individually retained counsel physically

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[110] See, *e.g.*, United States v. Brown, 13 USCMA 14, 32 CMR 14 (1962); United States v. Wheaton, 9 USCMA 257, 26 CMR 37 (1958); United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957).

[111] United States v. Brown, 13 USCMA 14, 32 CMR 14 (1962); United States v. Powell, 13 USCMA 364, 32 CMR 364 (1962).

[112] ". . . Of course, the Staff Judge Advocate was not bound to assign military counsel to the accused. However, he was *obligated* to give him correct advice. . . ." [Emphasis supplied.] 8 USCMA at 135, 23 CMR at 359.

[113] See United States v. Brown, 13 USCMA 14, 32 CMR 14 (1962); United States v. Powell, 13 USCMA 364, 32 CMR 364 (1962).

[114] United States v. Powell, *supra* note 113.

[115] *Cf.*, UCMJ, Art. 38(*b*); MCM, 1951, para. 48*b*.

[116] See United States v. Justice, 13 USCMA 31, 40–41, n. 4, 32 CMR 31 (1962). See also United States v. Slamski, 11 USCMA 74, 77, 28 CMR 298, 301 (1959). This is in addition to the required advice that he could retain a civilian lawyer.

present during a preliminary interrogation."[117] Upon request the accused appeared at the Criminal Investigation Detachment Office accompanied by his retained civilian counsel. Counsel was excluded from the ensuing interrogation, but the accused made no statement. Two days later the accused and counsel returned to the Criminal Investigation Office. While a statement was being given, counsel was again required to wait in the anteroom. The accused was permitted to leave the office while the statement was being typed. He returned, read and signed the statement which was admitted at the trial despite the objection of counsel who complained that if he had been there the accused would not have incriminated himself. The Court of Military Appeals held the statement to have been properly admitted.

The Court held that exclusion of counsel during an interrogation is not prejudicial if "the statement admitted in evidence was voluntarily obtained after the accused had sufficient opportunity to consult with counsel."[118] The opinion included the following disclaimer:

> . . . We do not, however, wish to be understood in any manner as placing our approval on the practice of excluding the presence of individually retained counsel from an interrogation prior to the preferral of charges. We simply do not reach that issue in this case.[119]

The holding of the Court, which supported an exclusion of counsel, appears inconsistent with the subsequent denial that they were approving that practice. The inconsistency is resolved if the Court meant that the statement was "volunteered" rather than merely "voluntary." A "voluntary" statement, as that term is used in the law of confessions, can result from interrogation, but a "volunteered" statement is spontaneous—not extracted by interrogation.[120]

The reported facts in *United States v. Melville* are not clear on the point, but it is likely that Melville and his counsel returned to the Criminal Investigation Office expressly to make a statement. What may have happened is that Melville decided to supply an explanation concerning the suspected offenses. As he did so the investigating agents possibly pointed to inconsistencies with the evidence which caused him to deviate from his planned statement. It was the deviations from plan which were incriminating and

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[117] See 8 USCMA 597, 600, 25 CMR 101, 104 (1958).
[118] See United Sttaes v. Melville, 8 USCMA 597, 600, 25 CMR 101, 104 (1958).
[119] *Ibid.*
[120] See MCM, 1951, para. 140*a*.

which would have been prevented had counsel been present. The Court simply refused to call such questioning an interrogation.[121] Instead the statement was treated as spontaneous.

More lenient rules of admissibility apply to volunteered statements than to those obtained by interrogation.[122] This exception to strict application of rules of evidence is based upon waiver. It may be said that Melville's confession was admissible as a spontaneous statement or that he waived presence of counsel. Waiver is found because of a free election by an informed suspect to give a statement despite the exclusion of his lawyer.

In two cases decided after *United States v. Melville*, the Court of Military Appeals applied the spontaneous statement exception to the requirement that an accused who makes an appropriate request must be informed of his right to the assistance of counsel.[123] In *United States v. Cadman*, at an interrogation after apprehension the accused said he wanted legal advice. The agent did not reply to the request but terminated the interrogation. A day and a half later the agent asked the accused if he desired to make a statement. Holding the confession which followed admissible evidence, the Court said:

> The record of trial shows the accused was not questioned at the outset of the second meeting by Agent La Belle. He was merely asked if he desired to make a statement. If he did La Belle would listen, otherwise he would leave. . . . The evidence compellingly establishes that the accused *volunteered* a statement because he believed "the jig was up". . . . [Emphasis supplied.] [124]

In *United States v. Slamski*, an admission of guilt made to the staff judge advocate was held to be proper evidence since there was *no interrogation*.[125]

The Court of Military Appeals has recognized a "volunteered statement" exception to the rules governing the pretrial right to counsel. By use of the exception the Court was able to leave the question of the right to presence of counsel during interrogation unanswered in *United States v. Melville*.[126]

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[121] Compare United States v. Killough, 193 F. Supp. 905, 917–18 (D.C. 1961), *rev'd on other grounds*, 315 F.2d 241 (D.C. Cir. 1962); People v. Garner, 18 Cal. Repr. 40, 367 P.2d 680 (1961).

[122] See MCM, 1951, para. 140*a*; *cf.*, United States v. Massiah, 307 F.2d 62 (2d Cir. 1962).

[123] See United States v. Cadman, 10 USCMA 222, 27 CMR 296 (1959).

[124] United States v. Cadman, 10 USCMA 222, 224, 27 CMR 296, 298 (1959).

[125] United States v. Slamski, 11 USCMA 74, 76, 28 CMR 298, 300 (1959).

[126] 8 USCMA 597, 600, 25 CMR 101, 104 (1958).

The issue of the right to counsel in the interrogation room remains in doubt.[127] The Court of Military Appeals has, in dicta, approved both exclusion and presence. In *United States v. Moore*, the Court noted, "there exists no constitutional prohibition against police examination *in private* of those in lawful custody." [Emphasis supplied.][128] But the dictum in *United States v. Gunnels* that the suspect has "a right to have his counsel present with him during an interrogation"[129] has been repeated with approval.[130]

C. *WAIVER*

The Court of Military Appeals has discussed the cases after *United States v. Gunnels*[131] in terms of whether or not government agents *denied* the accused the rights accorded by the *Gunnels* opinion. The Court has applied the "denial of rights" formula without distinguishing the right involved. The right to consult retained counsel is infringed only by affirmative governmental action—either misadvice as to the right[132] or through physical interference which prevents reasonable opportunity to exercise the right.[133] The right to receive correct information is denied if the government does not act when the obligation arises or if the suspect is prevented from obtaining advice. The Court has given no indication it intends to relieve the staff judge advocate of the affirmative obligation to provide information when requested; however, governmental inaction has not been recognized as error.[134]

The failure of the court to distinguish between the two distinct rights granted by *Gunnels* has led to confusion which can be resolved by application of established principles of waiver. As a general rule when a suspect has the right to have counsel appointed to assist him, no waiver of the right will be found unless he has expressly declined an offer of assistance. That is, he must make a

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[127] The absence of cases in point indicates how few military accused exercise the right to retain civilian counsel—at least at the early pretrial state.

[128] United States v. Moore, 4 USCMA 482, 487, 16 CMR 56, 61 (1954).

[129] United States v. Gunnels, 8 USCMA 130, 135, 23 CMR 354, 359 (1957).

[130] See United States v. Brown, 13 USCMA 14, 17, 32 CMR 14, 17 (1962); United States v. Slamski, 11 USCMA 74, 77, 28 CMR 293, 301 (1959); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 236–37 (1961).

[131] 8 USCMA 130, 23 CMR 354 (1957).

[132] See United States v. Wheaton, 9 USCMA 257, 26 CMR 37 (1958); United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957); United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957).

[133] *Cf.* United States v. Adkins, 11 USCMA 9, 28 CMR 233 (1959) (dissenting opinion) (dictum).

[134] See United States v. Kantner, 11 USCMA 201, 29 CMR 17 (1960).

knowing and informed election to forego his right.[135] Furthermore, federal procedure requires that the suspect be informed of his right to retain counsel.[136] Waiver of this advice is not contemplated by the federal rules. On the other hand if the right to the assistance of *retained* counsel is not asserted it is waived.[137]

1. *Waiver of Right to be Informed.*

The suspect's right to be informed of his right to the assistance of counsel arises when he requests such information. It is the *duty* of the interrogators and of the staff judge advocate to honor the request.[138] The situation is roughly analogous to that where there is a right to appointed counsel. In both cases the burden is upon the government to provide the required assistance and waiver is appropriate only if proffered aid is declined. Restricted application of waiver is more analogous to the Federal rules which require advice in every case. The requirement that proper information be furnished upon request is meaningless unless an interrogation is terminated immediately when request is made. The suspect may withdraw the request and submit to interrogation, but in that event the record should clearly show that he made a knowing and informed election to forego the right to proper advice.

There are four military cases where the general factual situation can be deemed to raise an issue of waiver of the right to advice.[139] The factual situation common to the cases may be summarized as follows: (1) suspect requests advice, (2) interrogation terminated, (3) suspect fails to obtain advice, (4) confession.

In two of the cases,[140] despite his request for advice, the accused volunteered a statement without being interrogated. In this situation the accused may be said to have waived the right to advice. Clearly the government agents are not required to stop

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[135] Carnley v. Cochrane, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938); United States v. Howell, 11 USCMA 712, 29 CMR 528 (1960); United States v. Rhoden, 1 USCMA 193, 2 CMR 99 (1952).

[136] FED. R. CRIM. P. 5(b).

[137] *Cf.* Adams v. United States, 317 U.S. 269, 279 (1943).

[138] United States v. Gunnels, 8 USCMA 130, 134–5, 23 CMR 354, 358–9 (1957).

[139] See United States v. Kantner, 11 USCMA 201, 29 CMR 17 (1960); United States v. Cadman, 10 USCMA 222, 27 CMR 296 (1959); United States v. Adkins, 11 USCMA 9, 28 CMR 233 (1959); United States v. Slamski, 11 USCMA 74, 28 CMR 298 (1958).

[140] United States v. Cadman, *supra* note 139; United States v. Slamski, *supra* note 139.

listening. They are only bound to discontinue the *interrogation.*[141] The statements given in these two cases were properly admitted.

In *United States v. Adkins,*[142] the accused requested the advice of counsel when faced with a polygraph examination. The examination was not conducted and he was told to see the staff judge advocate. His attempts to obtain an interview with the staff judge advocate were ineffective. Four days after the abortive polygraph examniation, he was interrogated and confessed. The matter of counsel was not discussed at the interrogation. Judge Latimer for himself and Chief Judge Quinn held the confession to be admissible because "He [the accused] was never refused permission to obtain legal advice, nor was he misadvised. . . ." [143] The court without expressly referring to the question of waiver also said:

> . . . And last, and perhaps most important, while accused stated he did not know he could demand counsel on December 9 [the day of the interrogation], he testified he was quite aware he could request legal assistance, yet he failed even to mention such a desire to the OSI agents who took his statement. . . .[144]

The Court seems to be saying that the right to information concerning counsel will be waived unless asserted specifically in connection with interrogation. Since the accused testified that he knew of his right to obtain legal advice there was an informed waiver.

The result reached in *United States v. Adkins* is justified because the accused judicially admitted that he had made a knowing and informed waiver of his right to obtain legal assistance before he was interrogated. In view of his knowing waiver it was immaterial that there may have been misadvice or denial of the right in regard to a request for counsel for some purpose not connected with the interrogation. Application of waiver principles to the facts clarifies what is otherwise an obscure opinion.[145]

In *United States v. Kantner,*[146] at the beginning of an interrogation the accused said he would like to talk to a lawyer. The

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[141] The distinction between a volunteered confession and one obtained by interrogation has been discussed *supra,* at page 21.

[142] 11 USCMA 9, 28 CMR 233 (1959).

[143] See United States v. Adkins, 11 USCMA 9, 13, 28 CMR 233, 237 (1959).

[144] *Ibid.*

[145] The Court also cites United States v. Cadman, 10 USCMA 222, 27 CMR 296 (1959), and asserts that Adkins also "volunteered his statement." This makeweight is completely inappropriate because Adkins confessed after interrogation, while Cadman did not. *United States v. Cadman* is discussed at page 22 *supra.*

[146] 11 USCMA 201, 29 CMR 17 (1960).

reply to this statement was, "This boy has been over the coals, before. He knows what it is all about." [147] A three-hour interrogation followed which culminated in a written confession. Chief Judge Quinn writing for himself and Judge Latimer held the confession to be admissible because there was no proof of misadvice or denial of opportunity to talk to counsel. Judge Ferguson dissented because he believed the accused had been deprived of his right to consult counsel.

It is submitted that Kantner's statement was sufficient to constitute a request for legal advice. His request created a right which was neither honored nor knowingly waived. Therefore the confession should not have been held admissible. Failure to consider the case from the waiver aspect led the court to an opinion which conflicts with the *Gunnels* case. The court attempted to distinguish *United States v. Gunnels* on the ground that Gunnels was erroneously informed he could not consult with a lawyer. But the *Gunnels* opinion also held that an uninformed and unknowing accused has the right to be informed of his rights and places the duty to inform him upon the government.[148] The government did not fulfill its obligation to advise Kantner properly, and there is no evidence that he knowingly waived his right to advice. In these circumstances it is immaterial to argue that he was not denied an opportunity to consult with counsel. The opinion has the unfortunate effect of encouraging criminal investigators to ignore a request for advice without providing any guidance as to when the request must be honored. It will be surprising if the *Kantner* case does not lead to further litigation.

2. *Waiver of Right to Assistance of Retained Counsel.*

The Court of Military Appeals has established the rule that a suspect has the right to the assistance of retained counsel at preliminary interrogation. There is no obligation on the government to do more than provide the accused a reasonable opportunity to obtain retained counsel and to consult with him. Therefore, the right can be waived by the failure to assert it.

The principle that the suspect must himself act to obtain *retained* counsel or be deemed to have waived his right is too clear to be open to question. The troublesome, and as yet unanswered problem, is whether a suspect who has asked for and been given an opportunity to obtain retained counsel can be interrogated before

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[147] *Id.*, at 204, 29 CMR at 20.
[148] See United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957).

he has a chance to consult with his lawyer. The possible factual situations range widely. Interrogation may occur immediately after the accused has called his retained counsel while counsel comes from his home or office to the police station. At the other extreme, the accused might not obtain counsel despite ample opportunity. It is submitted that the accused who requests must be given reasonable opportunity to contact and consult his retained lawyer, and this requires termination of interrogation for a reasonable period. What is a reasonable time must be determined in each case. When a reasonable time has elapsed, it should be permissible to renew the interrogation and to continue it over requests for further opportunity to obtain counsel.[149] The right to the assistance of retained counsel would then be treated the same as any other right which may be waived by failure to exercise due diligence to preserve it.

D. *EFFECT OF FILING CHARGES*

Since a military accused has the right to the assistance of retained counsel during the preliminary investigation,[150] he has the same right after he has been charged. The fact that charges have been preferred has more significance in regard to the right to appointed military counsel.

In *United States v. Moore* [151] the Court of Military Appeals said:

> As a second basis for assault on the voluntariness of these confessions, defense counsel argue that the accused was not furnished with counsel during the interrogation. While it is worthy of note that he is not known to have made any request therefor, the complete answer to this contention is that *no right exists to be provided with appointed military counsel prior to the filing of charges. . . .* [Emphasis supplied.] [152]

The inference is that after charges are filed the accused has the right to appointed military counsel. However, the court has never directly so held.[153] Doubt as to the Court's meaning is raised because all of the facts in *Moore* occurred before filing of charges. It has never been the military practice to appoint counsel before the formal investigation conducted pursuant to the *Uniform Code of Military Justice,* Article 32. If a military lawyer is not re-

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[149] *Cf.,* United States v. Bell, 11 USCMA 306, 29 CMR 122 (1960).
[150] See United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957).
[151] 4 USCMA 482, 16 CMR 56 (1954).
[152] United States v. Moore, 4 USCMA 482, 486, 16 CMR 56, 60 (1954).
[153] The emphasized language was repeated in United States v. Gunnels, 8 USCMA 130, 133, 23 CMR 354, 357 (1957).

quested at the Article 32 investigation then no appointment is made until the case is referred for trial.[154]

The *Uniform Code of Military Justice* contemplates that charges will be filed soon after a suspect is placed in confinement. If there is sufficient evidence of an offense available, the unit commander is usually directed not to delay filing of charges until the criminal investigation is completed. Because of the demand for speed, it frequently happens that the accused is interrogated after charges have been preferred.

Secret interrogation after indictment solely for the purpose of obtaining incriminating evidence has been condemned as violating an accused's constitutional right to the assistance of counsel at an open trial.[155] While it can be argued that logically the right to presence of counsel should arise as soon as the crime is solved, no federal court has applied the rule to an interrogation before indictment.[156] By analogy, interrogation by military investigators should be permitted until the case is referred for trial. Mere filing of charges should not be the point at which all interrogation is cut off.

It has also been urged that the ethical requirement that the prosecutor deal with the accused through his lawyer precludes police interrogation in the absence of counsel after indictment.[157] The *Manual for Courts-Martial* recognizes the requirement,[158] but in context restricts its application to the period after charges are referred for trial. The Court of Military Appeals has not discussed the provision. Service boards of review have reached conflicting decisions,[159] but none has applied the provision to the period prior to the Article 32 investigation. The government has not been and should not be ethically bound to deal with the accused through counsel merely because charges have been preferred.

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[154] See MCM, 1951, para. 46*d*.

[155] See Spano v. New York, 360 U.S. 315 (1959) (concurring opinion by Douglas, J., joined by Black, J., and Brennan, J., and separate concurring opinion of Stewart, J., joined by Douglas, J., and Brennan, J.). Chief Justice Warren wrote the majority opinion holding the confession inadmissible because involuntary; however, the Chief Justice seems committed to the position taken by the concurring justices because he dissented in Crooker v. California, 357 U.S. 433 (1958).

[156] See United States v. Killough, 193 F. Supp. 905, 919, n. 44, (D.C. 1961), *rev'd on other grounds*, 315 F.2d 241 (D.C. Cir. 1962).

[157] See Canons of Professional Ethics of the American Bar Association, Canon 9. *But cf.* United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962).

[158] MCM, 1951, para. 44*h*.

[159] *Compare* ACM 12536, Frye, 25 CMR 769 (1958), *with* CM 399759, Grant, 26 CMR 692 (1958), *and* CM 403428, Mason, 29 CMR 599 (1960).

E. *ENFORCEMENT OF RIGHT*

1. *Constitutional Basis.*

The *Uniform Code of Military Justice* has no provision concerning the right to assistance of counsel before the investigation conducted pursuant to Article 32.[160] The right to counsel during the police investigation stage has been found by the Court of Military Appeals in its concept of military due process.[161] It is not within the scope of this article to determine the source or extent of the doctrine of military due process. It is sufficient to note that the United States Supreme Court and the Court of Military Appeals both believe that military personnel are protected by "fundamental" constitutional rights.[162] Among the rights considered fundamental is the right to the assistance of counsel.[163]

A military accused is generally granted more protection than is afforded his civilian counterpart. This is true in regard to the pretrial right to counsel.[164] However, the United States Supreme Court has in recent years shown an inclination greatly to expand the right to counsel.[165] It is not inconceivable that the Supreme Court might extend the constitutional right to assistance of counsel beyond that now afforded in the military. Should this occur, undoubtedly the Court of Military Appeals would apply the same rule or extend it even further.

2. *Remedy for Denial.*

A statement obtained at an interrogation where the accused has requested and been denied the assistance of retained counsel is not admissible evidence even though voluntary.[166] If the statement is erroneously accepted in evidence the appropriate relief is a rehear-

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[160] The articles providing for appointed counsel are UCMJ, Arts. 27(*a*), 32(*b*).

[161] See United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957).

[162] See Burns v. Wilson, 346 U.S. 137 (1953); United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960); Quinn, *supra* note 130; Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181 (1962).

[163] See United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951); Quinn, *supra* note 130.

[164] *Compare* United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957), *with* Crooker v. California, 357 U.S. 433 (1958). See also United States v. Melville, 8 USCMA 597, 25 CMR 101 (1958).

[165] See Gideon v. Wainwright, 372 U.S. 335 (1963) (leading case); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Crooker v. California, 357 U.S. 433 (1958) (dissenting opinion).

[166] United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957); United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957).

ing rather than dismissal of the charges.[167] Rehearing is granted without testing for prejudice.[168] If no confession is obtained, relief will be granted only if prejudice results from denial of the assistance of counsel during the pretrial proceeding.[169] Similarly, the court requires a showing that a later challenged confession was tainted by the denial of the assistance of counsel.[170]

V. SUMMARY, RECOMMENDATIONS AND CONCLUSION

A. *SUMMARY*

Police questioning is today a focal point in the conflict between individual liberty and the protection of society against criminals. A confession of guilt is extremely important to the police for it provides the quickest and easiest means of solving crime coupled with virtual assurance of eventual conviction of the criminal. Confessions are so important that it is out of the question to abandon their use entirely. Furthermore, any proposed restriction upon the methods by which confessions are obtained must carefully be considered for its effect upon the solution of crime.

On the other hand, the police must be restricted. Unchecked, they have shown they will utilize any means to obtain a confession. They will violate personal liberty and they will question suspects in a manner apt to cause an innocent man to confess.[171] Faced with the immediate need to solve a crime the police are simply incapable of recognizing the need for self restraint.

It is unfair to the police to expect them to exercise self restraint in matters where their duty is to be partisan. The law must assume responsibility to set limits upon police conduct. If individual rights are to be protected at all, clear rules must be estab-

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[167] United States v. Wheaton, 9 USCMA 257, 258, 26 CMR 37, 38 (1958).

[168] See United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957).

[169] *Cf.* United States v. Drain, 4 USCMA 646, 16 CMR 220 (1954).

[170] See United States v. Cadman, 10 USCMA 222, 27 CMR 296 (1959); United States v. Melville, 8 USCMA 597, 25 CMR 101 (1958).

[171] Modern interrogation does not rely on physical force, threats or promises; however, false confessions can be elicited by more subtle methods. The refined technique is little more than the use of psychological tricks to convince the subject that he is hopelessly implicated in the crime and to imply without promises that it will be better for him to admit his guilt. Assuming the interrogator has done his work well, the innocent as well as the guilty are subjected to tremendous pressures to supply a satisfactory statement, *i.e.*, one properly incriminating, consistent with the police theory of the crime. See INBAU, LIE DETECTION AND CRIMINAL INTERROGATION, 105–140 (2d ed. 1948); UNITED STATES DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 19–20, MILITARY POLICE INVESTIGATIONS, para. 42b(2) (1961).

lished and enforced. The law pertaining to pretrial rights is not clear; constitutional guarantees of personal liberty have not been fully enforced to restrict improper criminal investigation tactics. There are many areas where questionable police practices are neither sanctioned nor condemned. The courts are cautiously seeking to strike the balance.

Assistance of counsel should be the right of every American whether he is detained at the police station, held in custody at the jail or is under no restraint. In particular a person should have the right to consult with counsel before he is subjected to police questioning. Where the right to counsel exists, it should be available for all—the poor as well as the rich—which means provision must be made for appointed counsel.[172]

The right to the assistance of retained or appointed counsel while the suspect is in custody is certain to be recognized and enforced by the federal and military courts. Considering the certainty of broad enforcement of the pretrial right to counsel, *immediate* changes in military law are appropriate.

Military law does not lag behind civilian jurisdictions in its concern with protecting accused persons from unfairness or unjust convictions. Judge Kilday, considering whether a stringent rule for corroboration of confessions should apply, has said:

> . . . I point out that many of those in the military are now serving by reason of compulsory laws; many are away from home, family, and friends for the first time; and many are of an age making them responsible in some jurisdictions only as juveniles. Further, military personnel to whom confessions are made are, in many instances, of higher rank than the one confessing, and certainly, if only by reason of their duties, tend to have great influence under the circumstances. Also, in the military one has no choice as to associates or neighbors but must eat, sleep, and live with the persons with whom assigned.[173]

The ideas expressed by Judge Kilday are also cogent reasons why a military accused should be afforded the protection of the assistance of counsel to the fullest possible extent.

An additional reason for changing the present military law is to establish a clear rule which can be easily and uniformly applied throughout the services. The great advantage of legislative or executive action is that an entire field can be examined for appropriate changes while the courts are limited to the particular case

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[172] See Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Culombe v. Connecticut, 367 U.S. 571, 641 (1961) (concurring opinion).

[173] United States v. Smith, 13 USCMA 105, 120, 32 CMR 105, 120 (1962).

before them. Critical examination of the pretrial right to counsel reveals the need to create a cohesive system. Individual rights and public safety can best be balanced by treatment of the entire problem, and in that way rules can be devised which will satisfy the needs of the government while protecting the rights of the accused. The recommendations which follow are proposed in the belief that considered together they properly balance the interests of the individual and of society.

B. *RECOMMENDATIONS*

It is recommended that the military law in regard to a suspect's pretrial right to assistance of counsel provide that: (1) Before interrogation every suspect be advised of his right to consult retained or appointed counsel; (2) The accused have the right to request consultation with retained civilian counsel or with appointed military counsel before interrogation—if requested consultation is not provided, a statement obtained by interrogation to be inadmissible at a general court-martial; (3) The accused have no right to have counsel present in the interrogation room; and (4) A statement not obtained by interrogation be considered admissible even if the suspect's right to the assistance of counsel has been denied. In one sense the foregoing constitute a single recommendation because they are interdependent.

1. *Inform Suspect of Rights.*

The military rule which requires a suspect to request advice before he receives any information concerning his right to the assistance of counsel is basically unfair. The suspect who makes no request is presumably even more in need of information than the one who does. The young, inexperienced, confused and frightened suspect needs to be told of his right to consult with family, friends or a lawyer. If information is not provided in every case, then the suspect who most needs and deserves that protection does not get it.

It is recommended that a procedure be adopted whereby prior to interrogation a military suspect is informed of his right to the assistance of counsel.[174] The simplest procedure is to require the

[174] Under present procedure the accused is first advised of his right to counsel by the Article 32 investigating officer some days or weeks after arrest. The advice given is directed to the help of a lawyer at the probable cause hearing rather than at preliminary interrogation. The Article 32 investigating officer is appointed for each case and it is impractical to make appointment and conduct a probable cause hearing soon enough after apprehension to assure legal consultation before interrogation.

investigating agent to inform the suspect of his rights to counsel at the same time he is warned of his right to remain silent. The requirement could best be created by an addition to the *Uniform Code of Military Justice*, Article 31.

The great advantage of providing for warning by the interrogator is simplicity. No additional personnel will be needed, and established rules as to when an Article 31 warning is required can be followed. The rules are generally well understood by criminal investigators so very little litigation will be generated by the additional warning. Substantially the same advice as to right to counsel as is now provided by the *Federal Rules of Criminal Procedure* 5b would be given *before* every interrogation. Thus, a military suspect will receive the advice in some situations where it is not demanded by federal law.[175] On the other hand the difficulty of determining what constitutes "prompt appearance" will be avoided.[176] If advice as to the right to counsel is not given when required or if the suspect is not correctly advised, any statement subsequently made should not be admissible at a general court-martial,[177] but the evidence should be admissible at an inferior court-martial.[178]

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[175] Although not required by law it is the custom of FBI agents to conform to the proposed rule, that is to warn a suspect of his right to remain silent and of his right to counsel before every interrogation.

[176] It can be argued that the military should not go beyond an equivalent of the federal "prompt appearance" rule which often permits at least a short interrogation of an unwarned subject. Fairness to the individual aside, it is believed the procedure would be cumbersome and the military criminal investigator would not benefit by that rule. "Prompt appearance" would no doubt be strictly construed by the Court of Military Appeals to prevent delays for interrogation. Military personnel are traditionally on duty 24 hours a day so that a "military magistrate" would be readily available and thus there would be no opportunity for interrogation before appearance. Furthermore, the instant proposals will permit military investigators to check on a story volunteered by a suspect to a greater extent than is allowed federal police. Compare Mallory v. United States, 354 U.S. 449 (1957).

[177] The admissibility of a confession obtained after the suspect has given an inadmissible statement is a recurring problem. If the first statement is inadmissible solely because of failure to advise of the right to counsel, a statement obtained after proper advice should not be admissible unless the prosecution is able to show that the second statement is not the product of the first. Such a rule is necessary to prevent deliberate violations of the requirement to advise. *Cf.* Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962). The independence of the second statement can be clearly established by proof that the suspect had the advice of counsel who knew of the existence of the inadmissible statement. See Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960); Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960).

[178] This is similar to the Court's rule in regard to the accused's right to assistance of a qualified lawyer at depositions. See United States v. Drain, 4 USCMA 646, 16 CMR 220 (1958). The objection that it is extremely difficult to train young military policemen who are often called upon to investigate traffic violations and other minor offenses is thus answered.

2. *Consultation with Retained or Appointed Counsel.*

It is recommended that the suspect be permitted to consult counsel before interrogation. Appointed military counsel should be provided when requested. Waiver of assistance of counsel before interrogation should be found when, after advice, the suspect knowingly elects to forego his right.[179] Interrogation conducted without honoring the suspect's request for assistance of counsel would render a statement inadmissible evidence at a trial by general court-martial.[180]

Affording the assistance of counsel before interrogation will protect the suspect's substantial rights. The influence of the higher rank of the interrogator will be minimized. The frightening effect of being isolated from family and friends will be dissipated even though a period of private questioning follows. The use of force, threats or unlawful inducement at a subsequent private interrogation will be deterred by the knowledge that the suspect has counsel to assist him. Finally, advice and assistance of counsel will be an equalizing factor so that the more deserving suspect—the young and inexperienced—will receive the same protection of the law as that enjoyed by the mature individual. The possible effect assistance of counsel will have upon solution of crime will be considered in connection with the recommendation that counsel be barred from the interrogation room.

Affording the accused the right to have appointed military counsel has several advantages. United States military personnel are on duty in the four corners of the world, but practicing civilian members of the American Bar are not so widely distributed. This obvious fact illustrates the weakness in the present rule which affords a military suspect only the right to the assistance of *retained counsel.* There can be no justification for a military rule which denies a suspect a substantial right merely because the government has sent him to a remote and undesirable area, nor can a practice of denying the right to counsel to the person who cannot afford to retain a civilian lawyer be justified.[181] Counsel is ap-

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[179] Waiver can also be inferred if the suspect asserts his right to civilian counsel, but fails to retain a lawyer within a reasonable time.

[180] The statement will be admissible at an inferior court-martial. The staff judge advocate will evaluate the case to determine whether it is so serious as to require the assistance of counsel. The degree of independence granted criminal investigators to make the determination is properly a matter of command decision and should not be specified by the law.

[181] The Court of Military Appeals has not been presented a case where the suspect requests counsel but is physically or financially unable to retain a lawyer. Quite likely the court would find error in the failure to appoint military counsel if inability to retain counsel is clearly shown.

pointed for every accused at trial and upon request for the investigation conducted pursuant to the *Uniform Code of Military Justice*, Article 32, without regard to physical location or financial condition. The simplicity and equity of this procedure commends its application to the preliminary interrogation stage of the proceedings.

Army policy now honors an accused's request whenever military counsel is reasonably available.[182] However, since "reasonably available" is an elastic term the actual practice varies greatly. Some commands freely provide military counsel,[183] others only in selected cases (ironically these often involve officer offenders who least need detailed advice concerning their rights and who usually have the means to retain a civilian lawyer), and still others refuse counsel where not required by law. A more uniform practice is desirable.

The proposed change to the *Federal Rules of Criminal Procedure* 5b requires the United States Commissioner to appoint counsel at the accused's initial appearance if request is made. The military must be prepared to follow the federal practice [184] and should not hesitate to lead in granting a suspect procedural rights.

An expected criticism of the proposal to appoint counsel for every requesting accused is that there is an insufficient number of judge advocates to assume the additional burden imposed. It is very difficult to assess how much additional work will be involved. Lack of counsel will be a valid objection to the admissibility of a confession only at a general court-martial; therefore, counsel will not be needed before an interrogation concerning a minor offense. Experience indicates that the demand upon military counsel will not be as great as might be feared.[185] Appointed

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[182] The Judge Advocate General of the Army has said: ". . . As a matter of policy in the military, even though a man is not charged with an offense, if he goes to the judge advocate's office and asks for counsel, we will furnish him with a lawyer if we have one available, and we usually do; it is not an idle thing at all. Of course we won't tell him how to go about it if he wants to commit an offense, but if he is already in trouble the lawyer is there for him. . . ." American Bar Association Proceedings of the Section of Criminal Law, 108–9 (1962).

[183] See Comment, *Right of Military Personnel to Have Counsel Present During Investigation Prior to Preferral of General Court-Martial Charges*, 10 SYRACUSE L. REV. 169, n. 14 (1958).

[184] See UCMJ, Art. 36.

[185] In 1957 the Court of Military Appeals changed the then existing practice by requiring appointment of a military lawyer to defend an accused at an Article 32 investigation upon request. See United States v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957). It was found that additional judge advocates were not needed even though qualified counsel were appointed for most accused.

counsel can probably be provided with little or no increase over present judge advocate strength.

Even if additional judge advocates are required because of the increased right to appointed military counsel, denial of a substantial right cannot be justified upon the basis of lack of personnel. The complaint that additional lawyers may be needed simply is not a persuasive reason not to adopt a rule granting needed protection to a military accused.

3. *Counsel Excluded from Interrogation.*

It is recommended that after the suspect has had an ample period of consultation with his lawyer, private interrogation be permitted. The police will be allowed to create a suitable psychological climate for the operation of the "compulsion to confess," but of course continue to be limited by the present rules which forbid conduct likely to produce an involuntary confession. Finally, private interrogation should be allowed at any stage of the pretrial proceedings up to the time when the charges are referred to trial.

The permissible period of interrogation should be long enough to allow the urge to confess to build up in the guilty mind, but not be coercive to the innocent—perhaps two or three hours. When the necessity for a break for food or rest arises, then further opportunity to consult counsel should be granted before the interrogation continues. The total period which should be allowed will be limited only by the coercive effect of prolonged or repeated questioning.

It is believed that the procedure outlined will be substantially as effective from the police standpoint as is the present practice. In most instances a lawyer will tell a suspect who asserts his innocence to make a statement and to cooperate fully with the police.[186] The authorities will benefit by having a more cooperative witness than might otherwise be the case. Additionally, since fewer innocent persons will rely on their right to remain silent, even greater suspicion will fall on the person who refuses to make a statement. The police will be able to narrow and intensify their investigation outside the interrogation room, and the pressure on

[186] The lawyer's duty to the suspect is to obtain his release as quickly as possible. Providing a true exculpatory explanation is obviously the best means to that end, at least in most cases. The lawyer will tend to override other considerations such as the suspect's possible desire to protect the real perpetrator, his feeling that he should not be a "Squealer" or concern that his statement may embarrass him.

a guilty person to provide an explanation in an effort to appear innocent will be still greater.

It may be assumed that the lawyer will tell a guilty accused that it is best for him to remain silent.[187] Even so, it is likely that one or more of the reasons which now generate confessions will override the advice of counsel. In particular the police will not be bound to accept an exculpatory explanation at face value but will be permitted to cross-examine and to trap the suspect in inconsistencies.

If private interrogation is permitted the solution of crime will not be unduly frustrated even though the guilty suspect consults counsel before he is questioned. Unfair police conduct will be restrained, the frightened youngster will be reassured, but proper interrogation will continue to be effective. If counsel is present throughout all questioning the practice of interrogation will be finished as an effective method of obtaining evidence, because counsel will inevitably control the proceeding and prevent the suspect from making any incriminating statement.[188] Counsel might permit the guilty suspect to present a prepared exculpatory statement but such will necessarily be designed to be misleading. Permitting the accused to make a statement which cannot be effectively tested by cross-examination nor subject to having unanswered questions explored is unfair to the government. The authorities would doubtless refuse to conduct any interrogation, preferring to require the suspect to exculpate himself at a formal proceeding where cross-examination is available. The result would be the virtual loss of interrogation as an investigative tool as well as the means to obtain incriminating evidence. Obviously this result should be avoided, which is possible only if private interrogations are permitted.

In order to confront a suspect with newly discovered evidence criminal investigators should be permitted to interrogate so long as it is not certain that the case will be brought to trial. Until the charges are referred for trial the status of the subject of the proceedings is most accurately defined by the term "suspect." It is generally to the advantage of the government and of innocent suspects generally that the case remain under active investigation

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187 The lawyer might conclude that his client should admit his guilt of a lesser offense to assure that relevant evidence establishing lesser culpability not be overlooked or destroyed during the investigation and in the hope that the charge will state the lesser crime.

188 The possibility of having all interrogations secretly recorded or witnessed by the lawyer or by an impartial person is not inconsistent with the instant proposal if additional control of interrogations is considered desirable.

for as long as possible. But after the formal charge, the case is merely awaiting trial, and secret interrogation solely for the purpose of obtaining additional evidence to assure conviction should be prohibited as a violation of the right to an open trial.

The ethical requirement that the prosecutor deal with the accused through defense counsel does not apply until the case has been referred for trial.[189] Under the present proposals the suspect will be protected by preliminary advice that he may again consult counsel before questioning if he wishes. Preliminary advice is sufficient basis to justify permitting criminal investigators to deal directly with the suspect. Furthermore, it is more desirable from an administrative standpoint that the burden to arrange for consultation with his lawyer be placed upon the suspect.[190]

If the suspect is informed before interrogation that he will have the right to further consultation after a reasonable period of private questioning, and the right is subsequently afforded, the procedure is not improper. A procedure which permits no more than an opportunity for the operation of the "compulsion to confess" or cross-examination upon an exculpatory statement without interference of a defense lawyer is neither distasteful nor violative of fundamental rights.[191] Private interrogation should not be abandoned unless experience shows continued abuse of the power.

4. *Statements Given Without Interrogation.*

It has previously been urged that advice as to the right to counsel should be given in every case where an Article 31 warning is required. While that should be the usual rule, the following exception to that rule is recommended. A statement obtained without interrogation should be admissible at a general court-martial even though there has been no proper advice or if the accused has requested but not consulted with counsel. It should not be considered interrogation to explain to the suspect some or all of the

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189 See p. 28 *supra.*

190 The police should assist the suspect to contact his lawyer but should not become intermediaries. Waiver of the right to consultation will apply to subsequent interrogations as well as the initial one. See note 179 *supra.*

191 In Cicenia v. LaGay, 357 U.S. 504 (1948), Justice Harlan viewed with "strong distaste" a situation where the suspect had retained counsel before his arrest, but was denied further consultation with his lawyer for a period of more than seven hours while questioning continued. Prolonged and repeated refusal to permit consultation was criticized, not secret interrogation as such. The *Cicenia* episode is to be condemned because the suspect was precluded from being fully advised by his retained counsel and because the long period during which he was held incommunicado raises the spectre of coercion.

evidence which tends to incriminate him, and to ask him if he wishes to give any explanation.[192] If an explanation is made the police will be allowed to check out the story before advising of the right to counsel, because advice is required only preliminary to interrogation. It must be stressed that efforts to convince the suspect that it would be better for him to give an explanation or to attempt to cause him to change his statement by cross-examination will not be permitted. This proposal will allow the police to provide a suitable opportunity for spontaneous statements, but would deny them the use of any coercive psychological techniques. It can be expected that in order to avoid providing counsel, the police in some cases will refrain from conducting an interrogation perhaps for several days. If the delay is not contrived to be coercive, there is no objection. In other words, the proposal is to furnish counsel before interrogations; if there is no interrogation, then the present law permitting the accused to request counsel is adequate.

The proposal which will permit, after a warning of the right to remain silent, a simple request for an explanation is desirable because it tends to preserve the rapport between the commander and his men. The only serious crimes the commander should personally investigate are military offenses which occur in his command (for example, disobedience, assaults on superiors and wartime cowardice). These offenses are invariably witnessed by others so proof is relatively simple. Often a confession is merely cumulative, but the mitigating matter presented may sway the commander in his determination of the appropriate type of court to impose punishment. It is an important aspect of the exercise of command that the commander has the power to treat misconduct with less severity than the law permits. The accused is most likely to benefit from a commander's prerogative to be lenient if he freely provides a prompt explanation. If the accused waits until he has had the advice of counsel, the commander will most likely have already made his recommendation from the available facts and the matter will have passed from his hands. In any event, the psychological advantage which the accused gains from his willingness to have had his immediate commander decide his fate will be lost if he demands the intervention of counsel. The accused should have the right to choose an alternative to assistance of counsel if that alternative may be more beneficial to him.

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192 This recommendation principally constitutes recognition and consolidation of present law rather than a proposal for change.

C. *CONCLUSION*

There are indications that the United States Supreme Court may limit police questioning to neutral interviews to elicit facts—interrogation of suspects would be completely banned.[193] If such a rule is adopted, the police may be seriously hampered in their efforts to solve crimes. Investigators will be required to make fine distinctions as to the precise nature of their inquiry upon pain of having a confession held inadmissible. The foregoing recommendations attempt to forestall this trend by providing an acceptable alternative. Although considerable additional protection is granted persons suspected of crime, the power of the police to interrogate is retained and a simple, almost mechanical procedure is created.

The pretrial right to counsel is a matter of increasing concern.[194] Those interested in military justice should be alert to the immediate need for re-examination of this area in military practice. The advantage of putting one's own house in order constitutes the compelling reason to recognize every suspect's right to assistance of counsel before he is interrogated. If this basic right for rich and poor alike is self-enforced, it can be hoped that essential police functions can be preserved.

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[193] See Crooker v. California, 357 U.S. 433 (1959) (dissenting opinion); Spano v. New York, 360 U.S. 315 (1959) (concurring opinion of Douglas, J.).

[194] The Ford Foundation has made a grant to the American Law Institute to prepare a model code of procedure for the handling of prisoners before arraignment. One of the questions to be considered is whether the suspect should have the right to see his lawyer immediately after arrest. The New York Times, April 22, 1963, p. 30, col. 1.

THE EMPLOYMENT OF PRISONERS OF WAR*

BY COLONEL HOWARD S. LEVIE **

I. INTRODUCTION

From the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labor, and began to use them as slaves instead of killing them on the field of battle,[1] until the drafting and adoption by a comparatively large number of members of the then family of sovereign states of the Second Hague Convention of 1899,[2] no attempt to regulate internationally the use made of prisoner-of-war labor by the Detaining Power[3] had been successful.[4] The Regulations attached to that Convention dealt with the subject in a single article,[5] as did those attached

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[1] Davis, *The Prisoner of War*, 7 A.J.I.L. 521, 523 (1913).

[2] 32 Stat. 1803, T.S. No. 403.

[3] The Detaining Power is the state which holds captured members of the enemy armed forces in a prisoner-of-war status. The Power in whose armed forces they were serving at the time of capture is known as the "Power upon which they depend."

[4] Part of Art. 76 of Professor Francis Lieber's famous General Orders No. 100, April 24, 1863, "Instructions for the Government of the Armies of the United States in the Field," had dealt with this subject unilaterally; and provisions with respect thereto had likewise been included in Art. 25 of the Declaration drafted at the Brussels Conference of 1874 (2 U.S. FOREIGN RELATIONS 1017 (1876); 1 A.J.I.L. SUPP. 96 (1907)), and in Arts. 71 and 72 of the "Oxford Manual" drafted by the Institute of International Law in 1880 (Annuaire de l'Institut de Droit International, 1881–1882). While these efforts unquestionably influenced in material degree the decisions subsequently reached at the international level, none of them constituted actual international legislation.

[5] Art. 6 thereof reads:

"The State may utilize the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with military operations.

"Prisoners may be authorized to work for the public service, for private persons, or on their own account.

"Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

to the Fourth Hague Convention of 1907 [6] which, with relatively minor changes, merely repeated the provisions of its illustrious predecessor. A somewhat more extensive elaboration of the subject was included in the 1929 Geneva Convention relative to the Treatment of Prisoners of War[7] (hereinafter referred to as the 1929 Convention). And, although still far from perfect, the provisions concerning prisoner-of-war labor contained in the 1949 Geneva Convention relative to the Treatment of Prisoners of War[8] (hereinafter referred to as the 1949 Convention) constitute an enlightened attempt to legislate a fairly comprehensive code governing the major problems involved in the employment of prisoners of war by the Detaining Power.[9] The purpose of this study is to analyze the provisions of that code and to suggest not only how the draftsmen intended them to be interpreted, but also how it can be expected that they will actually be implemented by Detaining Powers in any future war.[10]

While there are very obvious differences between the employment of workers available through a free labor market and the employment of prisoners of war, even a casual and cursory study will quickly disclose a remarkable number of similarities. The labor union which is engaged in negotiating a contract for its members is vitally interested in: (1) the conditions under which they will work, including safety provisions; (2) their working hours and the holidays and vacations to which they will be entitled; (3) the compensation and other monetary benefits which they will receive; and (4) the grievance procedures which will

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"When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

"The wages of prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance."

[6] 36 Stat. 2277, T.S. No. 539.

[7] 47 Stat. 2021, T.S. No. 846.

[8] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364, 75 U.N. T.S. 135 (I:972).

[9] Arts. 49 through 57 and Art. 62 are the basic articles of the 1949 Convention relating to the subject of prisoner-of-war labor. Mention will be made of a number of other articles which touch on the subject.

[10] The author does not believe in the inevitability of major wars in the future, but he does believe, as did the 59 states which sent representatives to the Diplomatic Conference in Geneva in 1949 and the 87 states which have since either ratified or adhered to the four Conventions for the Protection of War Victims produced at that Conference, that, human nature being what it is, the outlawing of war and the existence of a state of peace are insufficient reasons for the apathy and attitude of complete disregard of the development of the law of war which has characterized many experts in the field of international law. Fortunately, there is evidence that a change in this attitude has occurred in recent years.

be available to them. (Of course, in each industry there will also be numerous items peculiar to that industry.) Because of the uniqueness of prisoner-of-war status, the 1949 Diplomatic Conference which drafted the latest prisoner-of-war convention felt it necessary, in negotiating for the benefit of future prisoners of war, to continue to cover certain items in addition to those listed above, such as the categories of prisoners of war who may be compelled to work (a problem which does not normally exist for labor unions in a free civilian society, although it may come into existence in a total war economy); and, collateral to that, the specific industries in which they may or may not be employed. Inasmuch as these latter problems lie at the threshold of the utilization of prisoner-of-war labor, they will be considered before those enumerated above.

Before proceeding to a detailed analysis of the labor provisions of the 1949 Convention, and how one may anticipate that they will operate in time of war, it seems both pertinent and appropriate to survey briefly the history of, and the problems encountered in, the utilization of prisoner-of-war labor during the past century. That period is selected because its earliest date represents the point at which cartels for the exchange of prisoners of war had ceased to have any considerable importance and yet belligerents were apparently still unaware of the tremendous potentiality of the economic asset which was in their hands at a time of urgent need.

II. HISTORY OF PRISONER EMPLOYMENT

A. *THE EARLY YEARS*

The American Civil War (1861–1865) was the first major conflict involving large masses of troops and large numbers of prisoners of war in which exchanges were the exception rather than the rule.[11] As a result, both sides found themselves encumbered with great masses of prisoners of war; but neither side made any substantial use of this potential pool of manpower, although both suffered from labor shortages.[12] This was so, despite the state-

[11] A general cartel governing the exchange of prisoners of war was entered into in 1862 (the Dix-Hill Cartel, July 22, 1862, War of the Rebellion, Series II, Vol. IV, p. 226 (1899)), but it was not observed to any great degree by either side. LEWIS AND MEWHA, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY, 1776–1945, pp. 29–30 (1955), [hereinafter cited as LEWIS, HISTORY].

[12] LEWIS, HISTORY 27, 41. For a vivid fictional, but factually accurate, picture of this waste of manpower in the South, with its resulting evils to the prisoners of war themselves, see KANTOR, ANDERSONVILLE (1955).

ment in Lieber's Code[13] that prisoners of war "may be required to work for the benefit of the captor's government, according to their rank and condition," and despite the valiant efforts of the Quartermaster General of the Union Army, who sought unsuccessfully, although fully supported by Professor Lieber, to overcome the official reluctance to use prisoner-of-war labor. The policy of the Federal Government was that prisoners of war would be compelled to work "only as an instrument of reprisal against some act of the enemy." [14]

In 1874 an international conference, which included eminent representatives from most of the leading European nations, met in Brussels at the invitation of the Tsar of Russia "in order to deliberate on the draft of an international agreement respecting the laws and customs of war." [15] This conference prepared a text which, while never ratified, constituted a major step forward in the effort to set down in definitive manner those rules of land warfare which could be considered to be a part of the law of nations. It included, in its Article 25, a provision concerning prisoner-of-war labor which adopted, but considerably amplified, Lieber's single sentence on the subject quoted above. This article was subsequently adopted almost verbatim by the Institute of International Law when it drafted Articles 71 and 72 of its "Oxford Manual" in 1880;[16] and it furnished much of the material for Article 6 of the Regulations attached to the Second Hague Convention of 1899 and the same article of the Regulations attached to the Fourth Hague Convention of 1907.

Despite all of these efforts, the actual utilization of prisoner-of-war labor remained negligible during the numerous major conflicts which preceded World War I. This last was the first modern war in which there was total economic mobilization by the belligerents; and there were more men held as prisoners of war and for longer periods of time than during any previous conflict. Nevertheless, it was not until 1916 that the British War Office could overcome opposition in the United Kingdom to the use of prisoner-of-war labor,[17] and after the entry of the United States into the war, prisoners of war held in this country were not usefully employed until the investigation of an attempted mass escape

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[13] See note 4 *supra*.
[14] LEWIS, HISTORY 37, 38–39.
[15] Preamble, Declaration of Brussels, *op. cit. supra* note 4.
[16] *Op. cit. supra* note 4.
[17] Belfield, *The Treatment of Prisoners of War* 9 TRANSACT. GROT. SOC'Y 131 (1924).

resulted in a recommendation for a program of compulsory prisoner-of-war labor, primarily as a means of reducing disciplinary problems.[18] When the belligerents eventually did find it essential to make use of the tremendous prisoner-of-war manpower pools which were available to them, the provisions of the Regulations attached to the Fourth Hague Convention of 1907 proved inadequate to solve the numerous problems which arose, thereby necessitating the negotiation of a series of bilateral and multilateral agreements between the various belligerents during the course of the hostilities.[19] Even so, the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January, 1919, listed the "employment of prisoners of war on unauthorized works" as one of the offenses which had been committed by the Central Powers during the war.[20]

B. *WORLD WAR II*

The inadequacies in this and other areas of the Fourth Hague Convention of 1907, revealed by the events which had occurred during the course of World War I, led to the drafting and ratification of the 1929 Convention.[21] It was this Convention which governed many of the belligerents during the course of World War II;[22] but once again international legislation based on the experi-

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[18] LEWIS, HISTORY 57. This was not the case in France, where the American Expeditionary Force had started planning for prisoner-of-war utilization even before any were captured, the established policy there being that all except officers would be compelled to work. *Id.* at 59–62.

[19] See, *e.g.*, the Final Act of the Conference of Copenhagen, executed by Austria-Hungary, Germany, Rumania, and Russia on Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D. C.); the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 BRIT. AND FOR. STATE PAPERS 557); the Agreement between France and Germany concerning Prisoners of War, executed at Bern on April 26, 1918 (*id.* at 713); and the Agreement with Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918, [1918] FOREIGN REL. U.S., Supp. 2, p. 103; 13 A.J.I.L. SUPP. 1 (1919). This latter Agreement contained a section of eleven articles (41–51) relating to prisoner-of-war labor.

[20] 14 A.J.I.L. 95, 115 (1920); HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 35 (1948).

[21] *Op. cit. supra* note 7. The "Final Report of the Treatment of Prisoners of War Committee," published in 30 INT'L. L. ASSOC. REPORTS 236 (1921) [hereinafter cited as FINAL REPORT], had contained a set of "Proposed International Regulations for the Treatment of Prisoners of War."

[22] As the U.S.S.R. was not a party to this Convention, it considered that its relations with Germany and the latter's allies on prisoner-of-war matters were governed by the Fourth Hague Convention of 1907. I REPORT OF THE INTERNATIONAL COMMITEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE

ence gained during a previous conflict proved inadequate to control the more serious and complicated situations which occurred during a subsequent period of hostilities.[23] Moreover, the proper implementation of the provisions of any agreement must obviously depend in large part upon the good faith of the parties thereto—and belligerents in war are, perhaps understandably, not motivated to be unduly generous to their adversaries, with the result that frequently decisions are made and policies are adopted which either skirt the bounds of legal propriety or actually exceed such bounds. The utilization of prisoner-of-war labor by the Detaining Powers proved no exception to the foregoing. Practically all prisoners of war were compelled to work.[24] To this there can be basically no objection. But during the course of their employment many of the protective provisions of the 1929 Convention (and of the Fourth Hague Convention of 1907 which it complemented) were either distorted or simply disregarded.

The leaders of Hitler's Nazi Germany were aware of its shortage of labor and appreciated the importance of the additional pool of manpower afforded by prisoners of war as a source of that precious wartime commodity. Nevertheless, for a considerable period of time they permitted their ideological differences with the Communists to overcome their common sense and urgent needs.[25] And in Japan, which, although not a party to the 1929

SECOND WORLD WAR 412 [hereinafter referred to as ICRC REPORT]. (No mention was made by the U.S.S.R. of the situation created by the *si omnes* clause contained in that Convention.) Japan, which was likewise not a party to the 1929 Convention, nevertheless announced its intention to apply that Convention *mutatis mutandis* on a basis of reciprocity. *Id.* at 443.

[23] "The international instruments regulating the treatment of prisoners of war were drawn up on the basis of the experience gained in the war of 1914–1918 and did not contemplate the wholesale and systematic use which many countries have since made of captive labor." Anon., *The Conditions of Employment of Prisoners of War: The Geneva Convention of 1929 and its Application*, 47 INT'L. LABOUR REV. 169 (Feb., 1943).

[24] In February, 1944, only 60% of the prisoners of war in the United States were being employed; by April, 1945, that figure had increased to more than 93%. LEWIS, HISTORY 125. In Germany "the mobilization of prisoner labor has been organized as part of the general mobilization of man-power for the execution of the economic program." Anon., *The Employment of Prisoners of War in Germany*, 48 INT'L. LABOUR REV. 316, 318 (Sept., 1943).

[25] Thus, it has been stated that the improved feeding of Russian prisoners of war by the Nazis in 1942 was instituted in order to obtain an adequate labor performance, and "must be assessed as a tactical sacrifice of dogma for the sake of short-range benefits to the warring Reich." DALLIN, GERMAN RULE IN RUSSIA 423 (1957). In the *Milch* case (U. S. v. Erhard Milch), 2 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, p. 782 [hereinafter referred to as Trials], the Military Tribunal quoted a 1943 statement of Himmler who, in speaking of the

Convention, had committed itself to apply its provisions, those relating to prisoner-of-war labor were among the many which were assiduously violated.[26]

Like the other belligerents, the United States found an urgent need for prisoner-of-war labor, both within its home territory and in the rear areas of the embattled continents. One study even goes so far as to assert that the use of Italian prisoners of war in the Mediterranean theater was the only thing which made it possible for the United States to sustain simultaneously both the Italian campaign and the invasion of Southern France, thereby hastening the downfall of Germany.[27] Similarly, it was found that in the United States the use of prisoners of war for work at military installations, and in agriculture and other authorized industries, served to release both Army service troops and civilians for other types of work which were more directly related to the war effort.[28]

While the benefits of prisoner-of-war labor to the Detaining Power are patent, benefits flowing to the prisoners of war themselves as a result of their use in this manner are no less apparent. The reciprocal benefits resulting from the proper use of prisoner-of-war labor is well summarized in the following statement:

> The work done by the PW has a high value for the Detaining Power, since it makes a substantial contribution to its economic resources. The PW's home country has to reckon that the work so done increases the war potential of its enemy, maybe indirectly; and yet at the same time it is to its own profit that its nationals should return home at the end of hostilities in the best possible state of health. Work under normal conditions is a valuable antidote to the trials of captivity, and helps PW to preserve their bodily health and morale.[29]

Russian prisoners of war captured early in the war, deplored the fact that at that time the Germans "did not value the mass of humanity as we value it today, as raw material, as labor."

[26] "The policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations." Judgment of the International Military Tribunal for the Far East 1082 (mimeo., 1948).

[27] LEWIS, HISTORY 199.

[28] FAIRCHILD AND GROSSMAN, THE ARMY AND INDUSTRIAL MANPOWER 194 (1959).

[29] 1 ICRC REPORT 327. See also PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR [hereinafter referred to as PICTET, COMMENTARY] 260 (1960); FLORY, PRISONERS OF WAR 71 (1942); Girard-Claudon, Les prisonniers de guerre en face de l'evolution de la guerre 151 (unpublished thesis at Université de Dijon, 1949); FEILCHENFELD, PRISONERS OF WAR 47 (1948). Art. 49 of the 1949 Convention specifically states that the utilization of prisoner-of-war labor is "with a view particularly to maintaining them in a good state of physical and mental health."

During the close reappraisal of the 1929 Convention which followed World War II, the provisions thereof dealing with the labor of prisoners of war were not overlooked; the Diplomatic Conference which met in Geneva in 1949 redrafted many of those provisions of the 1929 Convention in an effort to plug the loopholes which the events of World War II had revealed. It is the 1949 Convention resulting from this work which will be used in the review and analysis of the rights and obligations of belligerents and prisoners of war in any future conflict insofar as prisoner-of-war labor is concerned.

III. CATEGORIES OF PRISONERS OF WAR WHO MAY BE COMPELLED TO WORK

In general, Article 49 of the 1949 Convention provides that all prisoners of war, except commissioned officers, may be compelled to work. However, this statement requires considerable elaboration and is subject to a number of limitations.

The Detaining Power is specifically limited in that it may compel only those prisoners of war to work who are physically fit, and the work must be of a nature to maintain them "in a good state of physical and mental health." In determining physical fitness, it is prescribed that the Detaining Power must take into account the age, sex, and physical aptitude of each individual prisoner of war. It may be assumed that these qualities are to be considered not only in determining whether a prisoner of war should be compelled to work but also in determining the type of work to which the particular prisoner of war should be assigned. For example, women (and it must be accepted that in any future major war there will be many female prisoners of war) should not be given tasks requiring the lifting and moving of heavy loads; frequently, men who are physically fit to work may not have the physical aptitude for certain jobs by reason of their size, weight, strength, age, lack of experience, et cetera.[30] It would appear that the provisions of Article 49 of the 1949 Convention

[30] During World War II the Nazi use as miners of prisoners of war who did not have the necessary physical aptitude for this type of work and who were inexperienced was a constant source of trouble. The *I.G. Farben Case* (U. S. v. Krauch), 8 Trials 1187. The ICRC Delegate in Berlin finally proposed to the German High Command that prisoners of war over 45 years of age be exempted from working as miners, but this proposal was rejected by the Germans on the ground that the 1929 Convention made no reference to age as a criterion of physical qualification for compulsory labor. 1 ICRC REPORT 329–331. This situation has now been rectified.

require the Detaining Power, within reasonable limits, to assure the assignment of the proper man to the job.

Moreover, under the provisions of Articles 31 and 55 of the 1949 Convention, the determination of physical fitness must not only be made by medically qualified personnel and at regular monthly intervals, but also whenever the prisoner of war considers himself physically incapable of working. It should be noted that the first of the cited articles is a general one which requires the Detaining Power to conduct thorough medical inspections, monthly at a minimum, primarily in order to supervise the general state of health of the prisoners of war and to detect contagious diseases; while the second, which calls for a medical examination at least monthly, is intended to verify the physical fitness of the prisoner of war for work, and particularly for the work to which he is assigned.[31] It is evident that one medical examination directed simultaneously towards both objectives would meet the obligations thus imposed upon the Detaining Power.[32]

The provisions of Article 55 which authorizes a prisoner of war to appear before a medical board whenever he considers himself incapable of working has grave potentialities. It can be expected that well-organized prisoners of war, intent upon creating as many difficulties as possible for the Detaining Power, will be directed by their anonymous leaders to report themselves *en masse* and at frequent intervals as being incapable of working and to request that they be permitted to appear before the medical authorities of the camp. Is the Detaining Power to be helpless, if thousands of prisoners of war, many more than can be examined by available medical personnel, all elect at the same time to claim

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[31] The procedures followed in the United States during World War II were as follows: "Prisoners of war . . . are given a complete physical examination upon their first arrival at a prisoner of war camp. At least once a month thereafter, they are inspected by a medical officer. Prisoners are classified by the attending medical officer according to their ability to work, as follows: (a) heavy work; (b) light work; (c) sick, or otherwise incapacitated—no work. Employable prisoners perform work only when the job is commensurate with their physical condition." MacKnight, *The Employment of Prisoners of War in the United States*, 50 INT'L. LABOUR REV. 47 (July, 1944). Major McKnight's statement was based, at least in part, upon the U. S. War Department's Prisoner of War Circular No. 1, Regulations Governing Prisoners of War § 87 (Sept., 1943), which was, in turn, taken from Art. 48 of the 1918 U. S.-German Agreement, *op. cit. supra* note 19.

[32] Art. 31 speaks of "medical inspections," while Art. 55 uses the term "medical examinations." (A similar variation is found in the French version of the 1949 Convention.) It does not appear that any substantive difference was intended by the draftsmen, particularly inasmuch as Art. 31 considerably amplifies the term "inspection," making it clear that much more than a mere visual inspection was intended.

sudden physical unfitness and to demand physical examinations? Where the Detaining Power has good grounds for believing that such is the situation, and this will normally be quite apparent, it would undoubtedly be justified in compelling every prisoner of war to work until his turn for examination is reached in regular order with the complement of medical personnel which had previously been adequate for the particular prisoner-of-war camp. Thus the act of the prisoners of war themselves in attempting to turn a provision intended for their protection into an offensive weapon, illegal in its inception, would actually result in their causing harm to the very people it was intended to protect—the truly physically unfit prisoners of war.

The suggestion has been made that the medical examinations to determine physical fitness for work should preferably be made by the retained medical personnel of the Power upon which the prisoners of war depend.[33] This suggestion is based upon the fact that Article 30, in providing for the medical care and treatment of prisoners of war, states that they "shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality." However, there is considerable difference between permitting the medical personnel of the Power on which the prisoner of war depends to render medical assistance when he is ill or injured, and permitting such personnel to say whether he is physically qualified to work. It is not believed that any Detaining Power would, or that the Convention intended that it should, permit retained medical personnel to make final decisions in this regard.[34]

In his Instructions, Lieber gave no indication that the labor of *all* prisoners of war, regardless of rank, was not available to the Detaining Power in some capacity. However, Article 25 of the Declaration of Brussels and Article 71 of the "Oxford Manual" both provided that prisoners of war could only be employed on

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[33] PICTET, COMMENTARY 289. Captured medical service personnel are not prisoners of war and are entitled to be repatriated as soon as possible. Arts. 28 and 30, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362, 75 U.N. T.S. 31 (I:970). However, the Detaining Power temporarily retain some of these individuals to provide needed medical attention to prisoners of war, primarily those belonging to the armed forces of the Power to which the medical service personnel themselves belong (Art. 33). When so employed they are known as "retained medical personnel."

[34] Similarly, the function of determining whether a prisoner of war should be repatriated for medical reasons is not allocated to the retained medical personnel, but is the responsibility of the medical personnel of the Detaining Power and of the Mixed Medical Commissions (Art. 112).

work which would not be "humiliating to their military rank." The Second Hague Convention of 1899 reverted to Lieber's rather vague phrase, "according to their rank"; the Fourth Hague Convention of 1907 went a step further, adding to the foregoing phrase the words "officers excepted," thereby giving a legislative basis to a practice which had, in fact, already been followed.[35]

Both the 1929 Convention and the 1949 Convention are much more specific in this regard, the latter amplifying and clarifying the already more detailed provisions of its predecessor. While the first paragraph of Article 49 of the 1949 Convention authorizes the Detaining Power to utilize the labor of "prisoners of war," the second paragraph of that article specifies that non-commissioned officers (NCOs) may only be required to do supervisory work, and the third paragraph states that officers may not be compelled to work. It thus becomes clear that, as used in the first paragraph of this article, the term "prisoners of war" is intended to refer only to enlisted men below the non-commissioned officer grade.

During World War II several problems arose with respect to the identification of non-commissioned officers for labor purposes. In the first place, many NCOs had had their identification documents taken from them upon capture (probably for intelligence purposes) and were thereafter unable to establish their entitlement to recognition of their grade.[36] On the other hand, a number of individuals apparently claimed NCO grades to which they were not actually entitled, probably in order to avoid hard labor as well as to be entitled to the higher advances in pay.[37] In a number of respects the 1949 Convention attempts to obviate these problems.

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[35] During the Russo-Japanese War (1904–1905) the Japanese exempted officer prisoners of war from the requirement to work. ARIGA, LA GUERRE RUSSO-JAPONAISE AU POINT DE VUE DE DROIT INTERNATIONAL 114 (1907). Compare Takahashi, who stated that Japan did not impose labor on *any* Russian prisoners of war! INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR 125 (1908).

[36] The ICRC states that 26,000 German non-commissioned officer prisoners of war, whose identity papers had been taken from them in England, were compelled to work while interned in the United States because of their inability to prove their status. 1 ICRC REPORT 339. The German General Staff urged German non-commissioned officer prisoners of war to work, probably in order to avoid the deterioration, both physical and mental, which comes to the completely inactive prisoners of war. *Ibid.*

[37] Early in 1945 the U. S. military authorities discovered that many German prisoners of war had false documents purporting to prove non-commissioned status. They thereupon required all German prisoners of war who claimed to be non-commissioned officers to produce proof of such status in the form of a "*soldbuch*" or other official document. Thousands were unable to do so and were reclassified as privates. A Brief History of the Office of the Provost Marshal General, World War II, 516 (mimeo., 1946). To some extent these may have been the same prisoners of war referred to in the preceding note.

Thus, Article 21 of the 1929 Convention provided only that, upon the outbreak of hostilities, the belligerents would communicate to one another the titles and ranks in use in their armies in order to assure "equality of treatment between corresponding ranks of officers and persons of equivalent status." This was construed as limiting the requirements of this exchange of information to the ranks and titles of commissioned officers. Articles 43 of the new Convention makes it clear that the information is to be exchanged concerning the ranks and titles of *all* persons who fall within the various categories of potential prisoners of war enumerated in the Convention.[38] Further, during World War II the military personnel of each belligerent carried such identification documents, if any, as that belligerent elected to provide to its personnel. In addition, as just noted, it was not unusual for capturing personnel to seize these documents for whatever intelligence value they might have, leaving the prisoner of war with no official identification material. The 1949 Convention attempts to rectify both of these defects. In Article 17 it provides for an identification card containing, as a minimum, certain specified material concerning identity; prescribes the desirable type of card; provides that it be issued in duplicate; and states that while the prisoner of war must exhibit it upon the demand of his captors, under no circumstances may it be taken from him. This article, if complied with by the belligerents, should do much to eliminate the problem of identifying non-commissioned officers, which existed during World War II and which undoubtedly resulted in many incorrect decisions.

Two other problems connected with the labor of non-commissioned officers are worthy of comment. On occasions disputes may arise as to the types of work which can be construed as falling within the term "supervisory." The drafters of the 1949 Convention made no attempt to solve this problem. There is much merit in the solution offered by one authority, who says:

> The term "supervisory work" is generally recognized as denoting administrative tasks which usually consist of directing the other ranks; it obviously excludes all manual labor.[39]

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[38] It appears to the writer that the U. S. Army has created problems for itself in this respect by the establishment of a "specialist" classification of enlisted men who, although grouped in the same statutory grades as non-commissioned officers, are specifically stated not to be such. Army Regs. No. 600–201 (June 20, 1956). The strict interpretation of the term "non-commissioned officers" contemplated by the U.S.S.R. is evidenced by its expressed desire to limit non-commissioned office labor exemption privileges to regular army ("re-enlisted") personnel. II A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, pp. 348, 361, 566, [hereinafter cited as FINAL RECORD].

[39] PICTET, COMMENTARY 262.

The other problem relates to the right of a non-commissioned officer, who has exercised the privilege given him under both conventions to request work other than supervisory, thereafter to withdraw his request. During World War II different practices were followed by the belligerents. Thus Germany gave British non-commissioned officers the right to withdraw their requests;[40] while the policy of the United States was not to grant such requests for non-supervisory work in the first place, unless they were for the duration of captivity in the United States.[41] It has been urged that, inasmuch as a non-commissioned officer is free to undertake non-supervisory work, he should be equally free to discontinue such work, subject to the right of the Detaining Power to provide him with such employment only if he agrees to work for a fixed term, which may be extended upon his request.[42] This appears to be a logical and practical solution to the problem, although it is probably one to which not every belligerent will subscribe.

Officers cannot be required to do even supervisory work unless they request it. Once they have done so, the problems relating to their labor are very similar to those relating to the voluntary labor of non-commissioned officers, except that they were apparently rather generally permitted to discontinue working whenever they decided to do so. In general, the labor of officers has not caused any material dissension between belligerents.[43]

Scattered throughout the 1949 Convention are a number of other provisions specifically limiting the work which may be required of certain categories of enemy personnel, prisoners of war or others, held by a Detaining Power. Thus, medically trained per-

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[40] Sec. 59, German Regulations, Compilation of Orders No. 13, May 16, 1942. The apparent magnanimity of this provision is somewhat nullified by the last two sentences thereof, which indicate that "the employment of British non-commissioned officers has resulted in so many difficulties that the latter have by far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby."

[41] U. S. WAR DEPARTMENT TECHNICAL MANUAL 19–500, ENEMY PRISONERS OF WAR, ch. 5, § I, para. 4c (1955). A draft revision of this manual, which is currently under consideration in the Department of the Army, provides that "a non-commissioned officer may, at any time, revoke his voluntary request for work."

[42] PICTET, COMMENTARY. The Commentary continues with the statement that "during the Second World War, however, prisoners of war were sometimes more or less compelled to sign a contract for an indefinite period which bound them throughout their captivity; that would be absolutely contrary to the present provision." The present writer confesses himself unable to identify the portion of Art. 49 of the 1949 Convention which so provides, or to determine wherein, in this respect, it differs from the provisions of the 1929 Convention.

[43] 1 ICRC REPORT 337–338.

sonnel who, when captured, were not assigned to the medical services in the enemy armed forces and who are, therefore, ordinary prisoners of war, may be required to perform medical functions for the benefit of their fellow prisoners of war; but if they are so required, they are entitled to the treatment accorded retained medical personnel [44] and are exempted from any other work (Article 32). The same rule applies to ministers of religion who were not serving as such when captured (Article 36). Prisoners of war assigned to provide essential services in the camps of officer prisoners of war may not be required to perform any other work (Article 44). Prisoners' representatives may likewise not be required to perform any other work, but this restriction applies only "if the accomplishment of their duties is thereby made more difficult" (Article 81). While these various provisions are not of very great magnitude in the over-all prisoner-of-war picture, they can, of course, be of major importance to the particular individuals involved.

IV. TYPES OF WORK WHICH PRISONERS OF WAR MAY BE COMPELLED TO PERFORM

A. *PROBLEMS OF INTERPRETATION*

The types of work which prisoners of war may be compelled to perform and the industries to which they may be assigned have generated much controversy. Long before final agreement was reached thereon at the 1949 Geneva Diplomatic Conference, the article of the Convention concerned with the subject of authorized labor was termed "the most disputed article in the whole Convention, and the most difficult of interpretation." [45] Unfortunately, it appears fairly certain that the agreements ultimately reached in this area are destined to magnify, rather than to minimize or eliminate, this problem.[46]

The early attempts to draft rules concerning the categories of labor in which prisoners of war could be employed merely author-

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[44] See authorities cited note 33 *supra*.

[45] Statement of Mr. William H. Gardner (U.K.), IIA FINAL RECORD 442. In a statement in a similar vein, Brig. Gen. Joseph V. Dillon, then the Provost Marshal General of the U. S. Air Force, and a member of the U. S. Delegation at Geneva, later wrote: "Perhaps no section of the Convention gave rise to more debate and expressions of differences of view than that dealing with 'Labour of Prisoners of War.' At the outset, it appeared that all that could be agreed upon was the fact that the 1929 treatment of the subject was inadequate and ambiguous." *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L. Q. 40, 51 (1950).

[46] Baxter, Book Review, 50 A.J.I.L. 979 (1956).

ized their employment on "public works which have no direct connection with the operations in the theater of war," [47] or stated that the tasks of prisoners of war "shall have nothing to do with the military operations." [48] The insufficiency of these provisions having been demonstrated by the events of World War I, an attempt at elaboration was made in drafting the comparable provisions (Article 31) of the 1929 Convention, in which were included not only prohibitions against the employment of prisoners of war on labor having a "direct relation with war operations," but also against their employment on several specified types of work ("manufacturing and transporting arms or munitions of any kind, or . . . transporting material intended for combatant units").

During World War II these latter provisions proved no more successful than their predecessors in regulating prisoner-of-war labor. The term "direct relation with war operations" once again demonstrated itself to be exceedingly difficult to interpret [49] in a total war in which practically every economic resource of the belligerents is mobilized for military purposes.[50] So each belligerent attempting to comply with the labor provisions of the 1929 Convention found itself required to make a specific determination in all but the very few obvious cases as to whether a particular occupation fell within the ambit of the prohibitions.[51] As could be expected, there were many disputed decisions.

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[47] Art. 25, Declaration of the Conference of Brussels (1874), *op. cit. supra* note 4; Art. 71, "Oxford Manual" (1880), *op. cit. supra* note 4.

[48] Art. 6, Second Hague Convention of 1899, *op. cit. supra* notes 2 and 5. The only changes incorporated in Art. 6, Fourth Hague Convention of 1907, *op. cit. supra* note 6, were periphrastic in nature.

[49] "What constituted a direct relation with war operation was a matter of personal opinion or, indeed, guess." Dillon, *op. cit. supra* note 45, at 52. Similarly, in the *I. G. Farben Case* (U. S. v. Carl Krauch), 7 Trials 1, the Military Tribunal said (8 *id.* at 1189): "To attempt a general statement in definition or clarification of the term 'direct relation to war operations' would be to enter a field that the writers and students of international law have found highly controversial. . . ."

[50] Flory, *Vers une nouvelle conception du prisonnier de guerre?* 58 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 58 (1954); Janner, La Puissance protectrice en droit international d'aprés les expériences faites par la Suisse pendant la seconde guerre mondiale 54 (1948; original in German); Feilchenfeld, *op. cit. supra* note 29, at 13.

[51] The United States found it necessary to establish a Prisoner of War Employment Review Board, which was called upon to make a great number of decisions in this area. Mason, *German Prisoners of War in the United States*, 39 A.J.I.L. 198 (1945). Postwar researchers have collated lists which include literally hundreds of occupations as to which specific decisions were made. LEWIS, HISTORY 146–147, 166–167, 203; Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 51, note on 62 (1946).

In drafting a proposed new convention aimed at obviating the many difficulties which had arisen during the two world wars, the International Committee of the Red Cross attempted a new approach to the prisoner-of-war labor problem. Instead of specifying prohibited areas in broad and general terms, as had been the previous practice, leaving to the belligerents, the Protecting Powers, and the humanitarian organizations the decisions as to whether a specific task was or was not prohibited, it decided to list affirmatively and with particularity the categories of labor in which Detaining Powers would be permitted to employ prisoners of war, at least impliedly prohibiting their use in any type of work not specifically listed.[52] The International Red Cross Conference held at Stockholm in 1948, to which this new approach was proposed, accepted the idea of affirmatively specifying the areas in which prisoners of war could be required to work; but, instead of the enumeration of specifics which the Committee had prepared, the Conference substituted general terms.[53] The Committee was highly critical of this action.[54] At the 1949 Diplomatic Conference the United Kingdom proposed the substitution of the original proposal in place of that contained in the draft adopted at Stockholm, and it was this original text, with certain amendments which will be discussed later, which ultimately became Article 50 of the 1949 Convention.[55] While there is considerable merit to the new

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[52] Draft Revised or New Conventions for the Protection of War Victims 82–83 (Art. 42) (XVIIth International Red Cross Conference, Stockholm, 1948).

[53] ". . . work which is normally required for the feeding, sheltering, clothing, transportation and health of human beings . . ." I FINAL RECORD 83. It is of interest that this was substantially the policy which had been followed by the United States in interpreting the provisions of Art. 31 of the 1929 Convention. MacKnight, *op. cit. supra* note 31, at 54.

[54] Remarks and Proposals submitted by the International Committee of the Red Cross (Diplomatic Conference, Geneva, 1949) 50–52.

[55] Art. 50 reads:

"Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) Agriculture;

(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(c) transport and handling of stores which are not military in character or purpose;

(d) Commercial business, and arts and crafts;

(e) domestic service;

(f) public utility services having no military character or purpose.

"Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78."

approach, the actual phraseology of the article leaves much to be desired.[56]

B. *THE 1949 GENEVA CONVENTION*

An analysis of the various provisions contained in Article 50 of the 1949 Convention and, to the extent possible, a delimitation of the areas covered, or probably intended to be covered, by each category of work which a prisoner of war may be "compelled" to do,[57] and the problems inherent in each, is in order.

1. *Camp Administration, Installation or Maintenance.*

This refers to the management and operation of the camps established for the prisoners of war themselves; in other words, broadly speaking, it constitutes their own "housekeeping." Early in World War II the United States divided all prisoner-of-war labor into two classes: class one, that related to their own camps; and class two, all other.[58] This distinction still appears to be a valid one. It

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[56] In its Report to the Plenary Assembly of the Diplomatic Conference, Committee II (Prisoners of War) characterized this article as one which "clarifies [it] by a limitative enumeration of the categories of work which prisoners may be required to do." IIA FINAL RECORD 566. On the contrary, the expression "military character and purpose" used in subparas. *b*, *c*, and *f*, of Art. 50, is almost indefinable. As to those subparagraphs, the basic problem, which existed when the words "war operations" were used, remains unchanged. PICTET, COMMENTARY 266.

[57] The difficulties experienced in selecting the appropriate verb to be used in the opening sentence of Art. 50 were typical of the overall drafting problem. The following terms were contained in or suggested for the various texts, beginning with the original ICRC draft, which was submitted to the 1948 Stockholm Conference, and continuing chronologically through the various drafts, amendments, and discussions, until final approval of the article by the Plenary Assembly: "obliged to" (authority cited note 52 *supra*); "required to" (I FINAL RECORD 83); "obliged to" (III *id.* at 70); "employed on" (IIA *id.* at 272); "engaged in" (*id.* at 470); "obliged to" (*id* at 344); "compelled to" (IIB *id.* at 176); and "compelled to" (Art. 50, *op. cit. supra* note 55).

[58] Para. 77, Prisoner of War Circular No. 1, *op. cit. supra* note 31.

Para. 78 of the same Circular contained the following informative enumeration:

"78. Labor in class one is primarily for the benefit of prisoners. It need not be confined to the prisoner of war camp or to the camp area. Class one labor includes:

"a. That which is necessary for the maintenance or repair of the prisoner of war camp compounds including barracks, roads, walks, sewers, sanitary facilities, water pipes, and fences.

"b. Labor incident to improving or providing for the comfort or health of prisoners, including work connected with the kitchens, canteens, fuel, garbage disposal, hospitals and camp dispensaries.

"c. Work within the respective prisoner companies as cooks, cook's helpers, tailors, cobblers, barbers, clerks and other persons connected

has been estimated that the use of prisoners of war in the United States for the maintenance and operation of their own camps and of other military installations[59] constituted their major utilization.[60] While this is believed to be somewhat of an overstatement, it can be assumed that a very considerable portion of them will always be so engaged. However, it can also be assumed that in any future major conflict demands for prisoner-of-war labor will be so great that shortages will exist, requiring that the administration of prisoner-of-war camps be conducted on an extremely austere basis.

2. *Agriculture.*

This field of prisoner-of-war utilization, with its collateral field of food processing, combines with camp administration to account for the labor of the great majority of employed prisoners of war.[61] There are no restrictions imposed by the Convention on the employment of prisoners of war in agriculture,[62] the fact that the product of their labor may eventually be used in the manufacture of a military item or be supplied to and consumed by combat troops being too remote to permit of, or warrant, restrictions.

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with the interior economy of their companies. In apportioning work, consideration will be given by the company commander to the education, occupation, or profession of the prisoner."

[59] The utilization of prisoner-of-war labor for the operation and maintenance of military installations occupied by the armed forces of the Detaining Power does *not* fall within the classification of camp administration referred to in the Convention. While many such uses would probably come within the category of domestic services (cooks, cook's helpers, waiters, kitchen police, etc.), which are authorized, it would seem that many others are no longer permitted. (Employment in the Prisoner of War Information Bureau maintained by the Detaining Power is specifically authorized by Art. 122.)

[60] FAIRCHILD, *op. cit. supra* note 28, at 190. See also MacKnight, *supra* note 31, at 57.

[61] In the spring of 1940 more than 90% of the Polish prisoners of war held by the Germans were employed in agriculture; while this figure later dropped considerably, it always remained extremely high. Anon., *The Employment of Prisoners of War in Germany, supra* note 24, at 317. In the United States, even though more than 50% of the man-months worked in the industry by prisoners of war were performed in agricultural work, the demands for such labor could never be fully met. LEWIS, HISTORY 125–126. An exception to the foregoing occurred in Canada, where the great majority of prisoners of war were used in the lumbering industry. Anon., *The Employment of Prisoners of War in Canada,* 51 INT'L. LABOUR REV. 335, 337 (March, 1945).

[62] PICTET, COMMENTARY 266. It is interesting to note that the enumeration originally prepared by the ICRC (note 52 *supra*), which was ultimately restored to the Convention at the behest of the U. K. Delegation to the Conference, did not include agriculture as a separate item. A member of the U. S. Delegation urged that it be specifically listed, and his proposal was adopted without discussion or opposition. IIA FINAL RECORD 470.

3. *Production or Extraction of Raw Materials.*

This category of authorized compulsory employment includes activities in such industries as mining, logging, quarrying, et cetera. It is one of the areas in which problems are constantly arising and in which there are frequent disagreements between belligerents as well as between Detaining Powers and Protecting Powers or humanitarian organizations. Thus, after the conclusion of World War II the International Committee of the Red Cross reported that it was called upon to intervene more frequently with respect to prisoners of war who worked in mines than with respect to any other problem.[63]

Inasmuch as the utilization of prisoners of war in this field has been, and continues to be, authorized, the problems which arise usually relate to the physical ability of the particular prisoner of war to participate in heavy and difficult labor of this nature, and to working conditions, including safety precautions and equipment, rather than to the fact of the utilization of prisoners of war in the specific industry. The first of these problems has already been reviewed and the latter will be discussed at length in the general analysis of that specific problem.

4. *Manufacturing Industries (except Metallurgical, Machinery, and Chemical).*[64]

In modern days of total warfare and the total mobilization of the economy of belligerent nations, it has become increasingly impossible to state with positiveness that any particular industry does

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[63] 1 ICRC REPORT 329. For a specific example, see note 30 *supra*. Unfortunately, little data is available concerning the activities of Protecting Powers in this regard, as they rarely publish any details of their wartime activities, even after the conclusion of peace. Levie, *Prisoners of War and the Protecting Power*, 55 A.J.I.L. 374, 378 (1961). An unofficial report of Swiss activities as a Protecting Power during World War II is contained in Janner, La Puissance protectrice en droit international d'aprés les expériences faites par la Suisse pendant la seconde guerre mondiale (1948).

[64] The source of some of the wording and punctuation of subpara. (b) of Art. 50 is somewhat obscure. As submitted by Committee II (Prisoners of War) to the Plenary Assembly of the Diplomatic Conference, it read:

". . . manufacturing industries, with the exception of iron and steel, machinery and chemical industries and of public works, and building operations which have a military character or purpose" (IIA FINAL RECORD 585–586). Although this portion of Art. 50 was approved by the Plenary Assembly without amendment, in the Final Act of the Conference (which is, of course, the official, signed version of the Convention), the same provision reads:

". . . manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose" (I FINAL RECORD 254). These

not have *some* connection with the war effort. Where the degree of such connection is the criterion for determining the permissibility of the use of prisoners of war in a particular industry, as it was prior to the 1949 Convention, problems and disputes are inevitable. In this respect, by authorizing compulsory prisoner-of-war labor in most manufacturing industries and by specifically prohibiting it in the three categories of industries which will be engaged almost exclusively in war work, the new Convention represents a positive and progressive development in the law of war and has probably eliminated many potential disputes.

During World War II the nature of the item manufactured and, to some extent, its intended ultimate destination determined whether or not the use of prisoners of war in its manufacture was permissible. Thus, in the United States it was determined that prisoners of war could be used in the manufacture of truck parts, as these had a civilian, as well as a military, application; but that they could not be used in the manufacture of tank parts, as these had only a military application.[65] Under the 1949 Convention neither the nature nor the ultimate destination nor the intended use of the item being manufactured is material. *All* motor vehicles fall within the category of "machinery" and prisoners of war therefore may not be used in their manufacture. On the other hand, prisoners of war may be used in a food processing or clothing factory, even though some, or perhaps all, of the food processed or clothing manufactured may be destined for the armed forces of the Detaining Power.

Two sound bases have been advanced for the decision of the Diplomatic Conference to prohibit in its entirety the compelling of prisoners of war to work in the metallurgical, machinery, and chemical industries; first, that in any general war these three categories of industries will unquestionably be totally mobilized and will be used exclusively for the armaments industry; and second, that factories engaged in these industries will be key objec-

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changes in wording and punctuation (made in the English version only) represent a considerable clarification and should eliminate many disputes which might otherwise have arisen. However, it would be interesting to know their origin!

[65] LEWIS, HISTORY 77. After World War II one of the U. S. Military Tribunals at Nuremberg held:

". . . as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort." The *Milch Case* (U. S. v. Erhard Milch), *op. cit. supra* note 25, at 867. The decision would, in part, probably have been otherwise had the defense been able to show that the airplanes were intended exclusively for civilian use.

tives of enemy air (and now of enemy rocket and missile) operations and would, therefore, subject the prisoners of war to military action from which they are entitled to be isolated.[66] The Diplomatic Conference apparently balanced this total, industry-wide prohibition of compulsory labor in the three specified industries against the general authorization to use prisoners of war in every other type of manufacturing without requiring the application of any test to determine its relationship to the war effort.

It should be borne in mind that the prohibition under discussion is directed only against *compelling* prisoners of war to work in the specified industries. (As we shall see, by inverted phraseology, subparagraphs *b*, *c*, and *f* of Article 50 also prohibit the Detaining Power from compelling them to do certain other types of work where such work has "military character or purpose.") The question then arises as to whether they may volunteer for employment in those industries. Based upon the discussions at the Diplomatic Conference,[67] it clearly appears that the prohibitions contained in Article 50 are not absolute in character and that a prisoner of war may volunteer to engage in the prohibited employments, just as he is affirmatively authorized by Article 52 to volunteer for labor which is "of an unhealthy or dangerous nature." The problem will, of course, arise of assuring that the prisoner of war is a true volunteer and that neither mental coercion nor physical force has been used to "persuade" him to volunteer to work in the otherwise

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[66] PICTET, COMMENTARY 268–269.

[67] As indicated in note 57 above, the decision to use the words "compelled to" in the first sentence of Art. 50 was reached only after the consideration and rejection of numerous alternatives. Words such as "prisoners of war may only be employed in" were strongly urged because they would preclude the Detaining Power from using pressure to induce prisoners of war to "volunteer" for work which they could not be compelled to do (IIA FINAL RECORD 343); and words such as "prisoners of war may be obliged to do only" ("compelled to do only") were just as strongly urged on the very ground that the alternative proposal would preclude volunteering (*id.* at 342). The proponents of the latter position were successful in having their phraseology accepted by the Plenary Assembly.

[68] See Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 A.J.I.L. 433, 450 & n. 71 (1962). The ICRC appears to be inconsistent in asserting that the prohibition against prisoners of war working in these industries is absolute (PICTET, COMMENTARY 268), but that prisoners of war may volunteer to handle stores which are military in character or purpose (*id.* at 278), work which the Detaining Power is likewise prohibited from compelling prisoners of war to do. The statement that the absolute prohibition of Art. 7 against the voluntary renunciation of rights by prisoners of war was necessary "because it is difficult, if not impossible, to prove the existence of duress or pressure" (*id.* at 89) is, of course, equally applicable to all of the prohibitions of Art. 50, but the Diplomatic Conference obviously elected to take a calculated risk in this regard insofar as prisoner-of-war labor is concerned.

prohibited field of labor.[68] However, the fact that this particular problem is difficult of solution (and that the possibility undoubtedly exists that some prisoners of war will be coerced into "volunteering") cannot be permitted to justify an incorrect interpretation of these provisions of the Convention, as to which the indisputable intent of the Diplomatic Conference is clearly evidenced by the *travaux preparatoires.*

5. *Public Works and Building Operations Which Have No Military Character or Purpose.*

With respect to this portion of the subparagraph, it is first necessary to determine the meaning to be ascribed to the phrase "military character or purpose." This is no easy task.[69] Because the term defies definition in the ordinary sense, it will be necessary to define by example. Moreover, the discussions at the Diplomatic Conference, unfortunately, provide little that is helpful on this problem.

A structure such as a fortification clearly has, solely and exclusively, a "military character." Conversely, a structure such as a bowling alley clearly has, solely and exclusively, a civilian character. The fortification is intended for use in military operations; hence it has not only a "military character" but also a "military purpose." The bowling alley is intended for exercise and entertainment; hence it does not have a "military purpose," even if some or all of the individuals using it will be members of the armed forces.[70]

These examples have been comparatively black and white. Unfortunately, as is not unusual, there is also a large gray area. This is especially true of the term "military purpose." A structure will usually be clearly military or clearly civilian in character; but whether its purpose is military or civilian will not always be so easy of determination. A sewer is obviously civilian in character, and the fact that it is to be constructed between a military installation and the sewage disposal plant does not give it a mili-

[69] In his article (*supra* note 45, at 52), General Dillon showed considerable restraint when he said merely that many delegations believed that the phrase "will create some difficulty in future interpretations." He had been much more vehement at the Diplomatic Conference! (IIA FINAL RECORD 342–343.)

[70] The test is whether it is intended for military use, and not whether it is intended for use by the military. A bowling alley or a tennis court or a clubhouse might be intended, perhaps exclusively, for use by the military, but such structures certainly have no military use *per se* and, therefore, they do not have a "military purpose."

tary purpose. On the other hand, a road is likewise civilian in character, but a road leading only from a military airfield to a bomb dump would certainly have a military purpose. And a theater is civilian in character, but if it is a part of a military school installation and is to be used exclusively or primarily for the showing of military training films, then it, too, would have a military purpose. However, a theater which is intended solely for entertainment purposes, like the bowling alley, retains its civilian purpose, even though the audience will be largely military.

To summarize, if the public works or building operations clearly have a military character, prisoners of war may not be compelled to work thereon; if they do not have a military character, but are being undertaken exclusively or primarily for a military use, then they will usually have a military purpose and again prisoners of war may not be compelled to work thereon; while if they do not have a military character and are not being built exclusively or primarily for military use, then they have neither military character nor purpose, and prisoners of war may be compelled to work thereon, even though there may be incidental military use.[71]

Having determined, insofar as is possible, the meaning of the phrase "military character or purpose," let us apply it to some of the problems which have heretofore arisen. Although the use of compulsory prisoner-of-war labor in the construction of fortifications has long been considered improper,[72] after World War II a United States Military Tribunal at Nuremberg found "uncertainty" in the law, and held such labor not obviously illegal where it was ordered by superior authority and was not required to be performed in dangerous areas.[73] Under the 1949 Convention such a decision would clearly be untenable. A fortification is military in character and the use of compulsory prisoner-of-war labor in its construction is prohibited, no matter what the circumstances or location may be. The same is, of course, true of other construction of a uniquely military character such as ammunition dumps, firing

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[71] The foregoing position closely resembles the legal interpretation of the phrase in question proposed by the present author and approved by The Judge Advocate General of the United States Army in an unpublished opinion written in 1955. JAGW 1955/88 (1955). It differs from the ICRC position, which is that "everything which is commanded and regulated by the military authority is of a military character, in contrast to what is commanded and regulated by the civil authorities." PICTET, COMMENTARY 267.

[72] FLORY, *op. cit. supra* note 29, at 74.

[73] *The High Command Case* (U. S. v. Wilhelm von Leeb), 11 Trials 534. No such uncertainty existed in the minds of the members of the Tribunal with respect to the use of prisoners of war in the construction of combat zone field fortifications. *Id.* at 538.

ranges, tank obstacles, et cetera. On the other hand, bush clearance and the construction of firebreaks in wooded areas far from the battle fronts, the digging of drainage ditches,[74] the building of local air-raid shelters,[75] and the clearing of bomb rubble from city streets [76] are typical of the categories of public works and building operations which have neither military character or purpose.

If the foregoing discussion has added but little light to the problem, it is hoped that it has, at least, focused attention on an area which can be expected to produce considerable controversy; here, too, the problem will be further complicated by the question of volunteering.

6. *Transportation and Handling of Stores Which Are Not Military In Character or Purpose.*

Article 31 of the 1929 Convention prohibited the use of prisoners of war for "transporting arms or munitions of any kind, or for transporting material intended for combatant units." The comparable provisions of the 1949 Convention clarify this in some respects and obscure it in others.

The former provision created problems in the determination of the point of time at which material became "intended" for a combatant unit and of the nature of a "combatant unit." These problems have now been eliminated, the ultimate destination of the material transported or handled no longer being decisive.

Creating new difficulties is the fact that the problem of the application of the amorphous term "military in character and purpose" is presented once again. Apparently a prisoner of war may now be compelled to work in a factory manufacturing military uniforms or gas masks or camouflage netting, as these items are neither made by the three prohibited manufacturing industries nor is their military character or purpose material; but once manufactured, a prisoner of war may not be compelled to load them on a truck or freight car, as they probably have a military character and they certainly have a military purpose. Conversely, prisoners of war may not be compelled to work in a factory making barbed wire,

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[74] LEWIS, HISTORY 89.

[75] Sec. 738, German Regulations, Compilation of Orders No. 39 (July 15, 1944).

[76] PICTET, COMMENTARY 267–268, where a distinction is justifiably drawn between clearing debris from city streets and clearing it from an important defile used only for military purposes.

inasmuch as such a factory is in the metallurgical industry; but they may be compelled to handle and transport it where it is destined for use on farms or ranches, as it would have no military character or purpose. Surely, the Diplomatic Conference intended no such inconsistent results, but it is difficult to justify any other conclusions.

Just as was determined with respect to public works and building operations, it is extremely doubtful that the ultimate destination or intended use of the stores is, alone, sufficient to give them a military character or purpose. Thus, agriculture and food processing are, as has been seen, authorized categories of compulsory labor for prisoners of war. The food grown and processed obviously has no military character; the fact that it will ultimately be consumed by members of the armed forces, even in a battle area, does not give it a military purpose. Accordingly, prisoners of war may be compelled to handle and transport such stores. The same reasoning would apply to blankets and sleeping bags, to tents and tarpaulins, to socks and soap.

7. *Commercial Business, and Arts and Crafts.*

It is doubtful whether very many prisoners of war will be given the opportunity to engage in commercial business. The prisoner-of-war barber, tailor, shoemaker, cabinetmaker, et cetera, will ususually be assigned to ply his trade within the prisoner-of-war camp, for the benefit of his fellow prisoners of war as a part of the camp activities and administration. However, it is conceivable that in some locales they might be permitted to set up their own shops or to engage in their trades as employees of civilian shops owned by citizens of the Detaining Power.

That prisoners of war will be permitted to engage in the arts and crafts is much more likely. No prisoner-of-war camp has ever lacked artists, both professional and amateur, who produce paintings, wood carvings, metal objects, et cetera, which find a ready market, through the prisoner-of-war canteen, among the military and civilian population of the Detaining Power. However, normally this category of work will be done on spare time as a remunerative type of hobby, rather than as assigned labor.

8. *Domestic Service.*

The specific inclusion of this category of labor merely permits the continuation of a practice which was rather generally followed

during World War II and which has rarely caused any difficulty, inasmuch as domestic services have, of course, never been construed as having a "direct relation with operations of war." As long as the domestic services are not required to be performed in an area where the prisoner of war will be exposed to the fire of the combat zone, which is specifically prohibited by Article 23 of the 1949 Convention, the type of establishment in which he is compelled to perform the domestic services, and whether military or civilian, is not material.

9. *Public Utility Services Having No Military Character or Purpose.*

This is the third and final usage in Article 50 of the term "military character or purpose." Its use here is particularly inept, inasmuch as it is difficult to see how public utility services such as gas, electricity, water, telephone, telegraph, et cetera, can, under any circumstances, be deemed to have a military character.[77] With respect to military purpose, conclusions previously reached are equally applicable here. If the utility services are intended exclusively or primarily for military use, they will have a military purpose and the Detaining Power is prohibited from compelling prisoners of war to work on them. Normally, however, the same public utility services will be used to support both military and civilian activities and personnel and will not have a military purpose.

10. *Unhealthy, Dangerous, or Humiliating Labor.*

Article 52 of the 1949 Convention contains special provisions with respect to labor which is unhealthy, dangerous, or humiliating. These terms are not defined and it may be anticipated that their application will cause some difficulties and controversies. Nevertheless, the importance of the provision cannot be gainsaid.

Employing a prisoner of war on unhealthy or dangerous work is prohibited "unless he be a volunteer." *Assigning* a prisoner of war to labor which would be considered humiliating for a member of

[77] In PICTET, COMMENTARY 268, the statement is made that these public utility services have a military character "in sectors where they are under military administration." The present writer finds it impossible to agree that the nature of the administration of these public services can determine their inherent character. If this were possible, then public utility service administered by the military authorities in an occupied area, as is normally the case, would be military in character, even though originally constructed for and then being used almost exclusively by the civilian population of the occupied territory.

the armed forces of the Detaining Power is prohibited. No differences can be perceived to have resulted from the use of the verb "employed on" in the first instance and "assigned to" in the second. Accordingly, it is believed that the omission of the clause "unless he be a volunteer" in the case of "humiliating" labor would preclude a prisoner of war from volunteering for labor which is considered to be humiliating. Perhaps the draftsmen believed that there would be no volunteers for work of a humiliating nature and that such a clause would be mere surplusage. However, this is probably not so.

Article 32 of the 1929 Convention forbade "unhealthful or dangerous work." In construing this provision the United States applied three separate criteria: first, the inherent nature of the job (mining, quarrying, logging, et cetera); second, the conditions under which it was to be performed (under a tropical sun, in a tropical rain, in a millpond in freezing weather, et cetera); and third, the individual capacity of the prisoner of war.[78] These criteria would be equally relevant in applying the substantially similar provisions of Article 52 of the 1949 Convention.[79]

It is quite apparent that there are criteria available for determining whether a particular job is unhealthy or dangerous and is, therefore, one upon which prisoners of war may not be employed. Nevertheless, there will undoubtedly be some borderline cases in which disputes may well arise as to the utilization of the nonvolunteer prisoners of war. However, there unquestionably will be more jobs in clearly permissible categories than there will be

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[78] LEWIS, HISTORY 112; MacKnight, *supra* note 31, at 55. The latter continues with the following statement:

". . . The particular task is considered, not the industry as a whole. The specific conditions attending each job are decisive. For example, an otherwise dangerous task may be made safe by the use of a proper appliance, and an otherwise safe job rendered dangerous by the circumstances in which the work is required to be done. Work which is dangerous for the untrained may be safe for those whose training and experience have made them adept in it." The third criterion mentioned in the text has already been discussed at pp. 324–326 *supra*.

[79] In determining whether an industry was of a nature to require special study, The Judge Advocate General of the United States Army rendered the following opinion in 1943:

". . . If in particular industries the frequency of disabling injuries per million man-hours is:

"a. Below 28.0—prisoner-of-war labor is generally available therein;

"b. Between 28.0 and 35.0—the industry should be specifically studied, from the point of view of hazard, before assigning prisoner-of-war labor therein;

"c. Over 35.0—the prisoner-of-war labor is unavailable, except for the particular work therein which is not dangerous. . . ."

prisoners of war available to fill them. Accordingly, the Detaining Power, which is attempting to handle prisoners of war strictly in accordance with the provisions of the Convention, can easily avoid disputes by not using prisoners of war on labor of a controversial character.

The third paragraph of Article 52 specifies that "the removal of mines or similar devices shall be considered as dangerous labor." By this simple statement the Diplomatic Conference, after one of its most heated and lengthy discussions,[80] made it completely clear that the employment of prisoners of war on mine removal is prohibited unless they are volunteers. The compulsory use of prisoners of war on this type of work was one of the most bothersome problems of prisoner-of-war utilization of World War II, particularly after the termination of hostilities.

The application of the prohibition against the assignment of prisoners of war to work considered humiliating for members of the armed forces of the Detaining Power should cause few difficulties.[81] Certainly the existence or non-existence of a custom or rule in this regard in the armed forces of the Detaining Power should rarely be a matter of controversy.[82] It is probable that, in the main, problems in this area will arise because the standard adopted is that applied in the armed forces of the Detaining Power rather than that applied in the armed forces of the Power upon which the prisoners of war depend. While this decision was indubitably the only one which the Diplomatic Conference could logically have

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[80] Those interested in the history and background of this problem and the debate at the Diplomatic Conference are referred to the following sources: 1 ICRC REPORT 334; III FINAL RECORD 70–71; IIA *id.* 272–273, 345; 443–444, IIB *id.* 290–295, 298–299; PICTET, COMMENTARY 277–278.

[81] "This rule has the advantage of being clear and easy to apply. The reference is to objective rules enforced by that Power and not the personal feelings of any individual member of the armed forces. The essential thing is that the prisoner concerned may not be the laughing-stock of those around him." PICTET, COMMENTARY 277.

[82] Although prohibitions against the use of prisoners of war on humiliating work were contained in Art. 25 of the Declaration of Brussels and Art. 71 of the Oxford Manual (*op. cit. supra* note 4), there was no similar provision in the 1929 Convention. Nevertheless, during World War II the United States recognized the prohibition against the employment of prisoners of war on degrading or menial work as a "well settled rule of the customary law of nations" (MacKnight, *supra* note 31, at 54), and even prohibited their employment as orderlies for other than their own officers (LEWIS, HISTORY 113). While this latter type of work is prohibited for personnel of the U. S. Army, it is believed that the prohibition is based upon policy rather than upon the "humiliating" nature of an orderly's functions. Apparently this is settled policy for the United States, as the same rule is found in the draft of the new directive on the subject of prisoner-of-war labor which is being prepared by the U. S. Army.

reached, it is not unlikely that prisoners of war will find this difficult to understand and that there will be tasks which they consider to be humiliating, even though the members of the armed forces of the Detaining Power do not, particularly where the prisoners of war come from a nation having a high standard of living and are held by a Detaining Power which has a considerably lower standard.

V. CONDITIONS OF EMPLOYMENT

We have so far considered the two aspects of prisoner-of-war labor which are peculiar to that status: who may be compelled to work and the fields of work in which they may be employed. Our discussion now enters the area in which most nations have laws governing the general conditions of employment of their own civilian citizens—laws which, as we shall see, are often applicable to the employment of prisoners of war.

A. *GENERAL WORKING CONDITIONS*

Article 51 of the Convention constitutes a fairly broad code covering working conditions. Its first paragraph provides that:

> Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

These provisions, several of which derive directly from adverse experiences of World War II, are, for the most part, so elementary as to require little exploratory discussion. However, one major change in basic philosophy is worthy of note. The 1929 Convention provided, in Articles 10 and 11, that the minimum standard for accommodations and food for prisoners of war should be provided for "troops at base camps of the Detaining Power." This standard was equally applicable to working prisoners of war. Article 25 of the 1949 Convention contains an analogous provision with respect to accommodations for prisoners of war generally—but the quotation from Article 51 given above makes it abundantly clear that, as to the lodging, food, clothing and equipment of working prisoners of war, the minimum standard is no longer that of base troops of the Detaining Power, but is that of "nationals of the Detaining Power employed in similar work." While this represents a continuation of adherence to a national standard, it is probable that the new national standard will be higher than the one previously

used, inasmuch as workers are frequently a favored class under wartime conditions.[83]

With regard to a somewhat similar provision contained in the second paragraph of the same article, less optimism appears to be warranted. This paragraph, making applicable to working prisoners of war "the national legislation concerning the protection of labor and, more particularly, the regulations for the safety of workers," was the result of a proposal made by the U.S.S.R. at the Diplomatic Conference, which received the immediate support of the United States and others.[84] This support was undoubtedly premised on the assumption that, if adopted, the proposal would increase the protection afforded to working prisoners of war. Second thoughts indicate that this provision may constitute a basis for reducing the protection which it was intended to afford prisoners of war engaged in dangerous employments. The International Committee of the Red Cross has found it necessary to point out that national standards may not here be applied in such a way as to reduce the minimum standards established by the Convention.[85] It now appears unfortunate that the Diplomatic Conference adopted the U.S.S.R. proposal rather than the suggestion of the representative of the International Labor Organization that it be guided by the internationally accepted standards of safety for workers contained in international labor conventions then already in being.[86] Moreover, the safety laws and regulations are not the only safety measures which are tied to national standards. The third paragraph of Article 51 requires that prisoners of war receive training and protective equipment appropriate to the work in which they are to be employed "and similar to those accorded

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[83] In addition, Art. 25 prescribes specific minimum standards for accommodations; Art. 26 provides for such additional rations as may be necessary because of the nature of the labor on which the prisoners of war are employed; and Art. 27 provides that prisoners of war shall receive clothing appropriate to the work to which they are assigned. It has been asserted that not only must the living conditions of prisoner-of-war laborers not be inferior to those of local nationals, but also that this provision may not "prevent the application of the other provisions of the Convention if, for instance, the standard of living of citizens of the Detaining Power is lower than the minimum standard required for the maintenance of prisoners of war." PICTET, COMMENTARY 271. While the draftsmen did intend to establish two separate standards (IIA FINAL RECORD 401), at least as to clothing, it is difficult to believe that any belligerent will provide prisoners of war with a higher standard of living than that to which its own civilian citizens have been reduced as a result of a rigid war economy.

[84] IIA FINAL RECORD 275.

[85] PICTET, COMMENTARY 271–272.

[86] IIA FINAL RECORD 275.

to the nationals of the Detaining Power." [87] This same paragraph likewise provides that prisoners of war "may be submitted to the normal risks run by these civilian workers." Inasmuch as the test as to what are "normal risks" is based upon the national standards of the Detaining Power, this provision, too, would appear to be a potential breeding ground for disagreement and dispute, particularly as the "normal risks" which civilian nationals of the Detaining Power may be called upon to undergo under the pressures of a wartime economy will probably bear little relationship to the risks permitted under normal conditions.

The reference to the climatic conditions under which the labor is performed, contained in the portion of Article 51 quoted above, is one of the provisions deriving from the experiences of World War II.[88] The 1929 Convention provided, in Article 9, that prisoners of war captured "where the climate is injurious for persons coming from temperate climates, shall be transported, as soon as possible, to a more favorable climate." It is well known that in a large number of cases this was not done. The 1949 Convention contains a somewhat similar general provision (in Article 22) concerning evacuation; but it was recognized that, despite the best of intentions, belligerents will not always be in a position to arrange the immediate evacuation of prisoners of war from the areas in which they were captured. Accordingly, the Diplomatic Conference wrote into the Convention the quoted additional admonition with respect to climatic conditions and prisoner-of-war labor. It follows that, where a Detaining Power cannot, at least for the time being, evacuate prisoners of war from an unhealthy climate, whether tropical or arctic, it must, if it desires to utilize the labor of the prisoners of war in that area even temporarily, make due allowances for the climate, giving them proper clothing,[89] the necessary protection from the elements, appropriate working periods, et cetera.

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[87] It could be argued that a proper grammatical construction of this provision of the Convention makes only the protective equipment and not the training subject to national standards. However, this is debatable, and, even if true, it would merely result in the application of an international standard in the very area where the national standard would probably be highest.

[88] The Judgment of the International Military Tribunal for the Far East (*op. cit. supra* note 26, at 1002) mentioned "forced labor in tropical heat without protection from the sun" as one of the atrocities committed against prisoners of war by the Japanese. The motion picture, "The Bridge on the River Kwai," graphically portrayed the problem.

[89] Art. 27 of the 1949 Convention specifically mentions that, in issuing clothing to prisoners of war (without regard to the work at which they are employed), the Detaining Power "shall make allowance for the climate of the region where the prisoners are detained."

Articles 51 of the 1949 Convention concludes with a prohibition against rendering working conditions more arduous as a disciplinary measure.[90] In other words, the standards for working conditions, be they international or national, established by the Convention may not be disregarded in the administration of disciplinary punishment to a prisoner of war, and it is immaterial whether the act for which he is being punished occurred in connection with, or completely apart from, his work. Thus, a Detaining Power may not lower safety standards, avoid requirements for protective equipment, lengthen working hours, withhold required extra rations, et cetera, as punishment for misbehavior. On the other hand, "fatigue details" of not more than two hours a day, or the withdrawal of extra privileges, both of which are authorized as disciplinary punishment, undoubtedly could be imposed, as they obviously do not fall within the terms of the prohibition; the extra rations to which prisoners of war are entitled under Article 26, when they are engaged in heavy manual labor, could undoubtedly be withheld from a prisoner of war who refuses to work, inasmuch as he would no longer meet the requirement for entitlement to such extra rations.

In the usual arrangement contemplated by the Convention for the utilization of the labor of prisoners of war, the prisoners, each working day, go from their camp to their place of employment, returning to the camp upon the completion of their working period. However, another arrangement is authorized by the Convention. Thus, where the place at which the work to be accomplished is too far from any prisoner-of-war camp to permit the daily round trip, a so-called "labor detachment" may be established.[91] These labor detachments, which were widely used during World War II, are merely miniature prisoner-of-war camps, established in order to meet more conveniently a specific labor requirement. Article 56 of the 1949 Convention required that it be organized and administered in the same manner as, and as a part of, a prisoner-of-war camp. Prisoners of war making up a labor detachment are en-

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[90] Art. 89 of the 1949 Convention contains an enumeration of the punishments which may be administered to a prisoner of war as a disciplinary measure for minor violations of applicable rules and regulations.

[91] At the Diplomatic Conference, Mr. R. J. Wilhelm, the representative of the International Committee of the Red Cross, stated that experience had indicated that the majority of all prisoners of war were maintained in labor detachments. IIA FINAL RECORD 276. This is confirmed by the series of articles which had appeared in the *International Labour Review* during the course of World War II. See 47 INT'L. LABOUR REV. 169, at 187 (general); 48 *id.* at 316, 318 (Germany); Anon. *The Employment of Prisoners of War in Great Britain*, 49 *id.* at 191 (Feb., 1944); and MacKnight, *supra* note 31, at 49 (United States).

titled to all the rights, privileges, and protections which are available under the Convention to prisoners of war assigned to, and living in, a regular prisoner-of-war camp.[92] However, the fact that local conditions render it impossible to make a labor detachment an exact replica of a prisoner-of-war camp does not necessarily indicate a violation of the Convention. As long as the provisions of the Convention are observed with respect to the particular labor detachment, it must be considered to be properly constituted and operated.[93]

One other point with respect to labor detachments is worthy of note. While Article 39 requires that prisoner-of-war camps be under the "immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power," there is no such requirement as to labor detachments. Although each labor detachment is under the authority of the military commander of the prisoner-of-war camp on which it depends, who will, of course, be a commissioned officer, there appears to be no prohibition against the assignment of a non-commissioned officer as the immediate commander. In view of the large number of labor detachments which will probably be established by each belligerent, it is safe to assume that the great majority of them will be under the supervision of non-commissioned officers.

A situation under which the utilization of prisoner-of-war labor will usually, although not necessarily, require the establishment of labor detachments is where they are employed by private individuals or business organizations. This is the method by which most of the many prisoners of war engaged in agriculture will probably be administered. During World War II, prisoners of war performing labor under these circumstances were frequently denied the basic living standards guaranteed to them by the 1929 Convention. Article 57 of the 1949 Convention specifically provides, not only that the treatment of prisoners of war working for private employers "shall not be inferior to that which is provided for by the present Convention," but also that the Detaining Power, its military authorities, and the commander of the prisoner-of-war

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[92] In addition to the requirements of Art. 56 for the observance of the present Convention in labor detachments, specific provisions as to these detachments are contained in Arts. 33 (medical services), 35 (spiritual services), and 79 and 81 (prisoners' representatives), among others.

[93] For example, Art. 25 provides that the billets provided for prisoners of war must be adequately heated. The fact that the parent prisoner-of-war camp has central heating, while the billets occupied by the men of the labor detachment have separate, but adequate, heating facilities, does not constitute a violation of the Convention.

camp to which the prisoners belong, all continue to be responsible for their maintenance, care, and treatment, and that these prisoners of war have the right to communicate with the prisoners' representative in the prisoner-of-war camp.[94] It remains to be seen whether the changes made in the provisions of the applicable international legislation will be successful in accomplishing their purpose.

One problem which may arise in the use of prisoner-of-war labor by private employers is that of guarding the prisoners of war. Frequently, the Detaining Power will provide military personnel to guard such prisoners of war. When it does so, the problems presented are no different from those which arise at the prisoner-of-war camp itself. If paroles have been given to and accepted by the prisoners of war concerned, there are likewise no problems peculiar to the situation.[95] But suppose that civilian guards are used. What authority do they have to compel a prisoner of war to work if he refuses to do so? Or to prevent a prisoner of war from escaping? And to what extent may they use force on prisoners of war?

If a prisoner of war assigned to work for a private employer refuses to do so, the proper action to take would unquestionably be to notify the military commander of the prisoner-of-war camp to which he belongs. The latter is in a position to have an independent investigation made and to impose disciplinary or judicial punishment, if and as appropriate.

If a prisoner of war assigned to work for a private employer who is not provided with military guards attempts to escape, the authority of the civilian guards is extremely limited. That they may use reasonable force, short of firearms, seems fairly clear. That the guards may use firearms to prevent the escape is highly ques-

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[94] This latter provision is included in order to enable them to register a complaint concerning their treatment, should they believe that it is below Convention standards. Of course, complaints may also be made to the representatives of the Protecting Power, who may visit these detachments whenever they so desire (Arts. 56 and 126), but these latter are not always immediately available, while the prisoners' representatives are. During World War II, both Great Britain and the United States provided for inspections by their own military authorities of the treatment of prisoners of war who were working for private employers. Anon., *The Employment of Prisoners of War in Great Britain*, *supra* note 91 at 192; Mason, *supra* note 51, at 212.

[95] Members of the U. S. Armed Forces may not accept parole, except for very limited purposes. Code of Conduct, Exec. Order No. 10631, 20 Fed. Reg. 6057 (1955); U. S. DEP'T. OF ARMY, FIELD MANUAL NO. 27–10, THE LAW OF LAND WARFARE § 2 (1956). The British rule is substantially similar. MANUAL OF MILITARY LAW, PART III, THE LAW OF WAR ON LAND § 246, n. 1 (1958).

tionable.[96] Detaining Powers would be well advised not to assign any prisoner of war to this type of labor, where he is to be completely unguarded or guarded only by civilians, unless the prisoner of war has accepted parole, or unless the Detaining Power has evaluated the likelihood of attempted escape by the particular prisoner of war and has determined to take a calculated risk in his case.

It would not be appropriate to leave the subject of conditions of employment without at least passing reference to the possibility of special agreements in this field between the opposing belligerents. Strangely enough, despite the fact that prisoner-of-war labor has been the subject of special agreements (or of attempts to negotiate special agreements) between opposing belligerents on a number of occasions during both World War I and World War II,[97] and despite numerous references elsewhere in the 1949 Convention of the possibility of special agreements, nowhere in the articles of the Convention concerned with prisoner-of-war labor is there any reference made to this subject. Nevertheless, such agreements, provided that they do not adversely affect the rights of prisoners of war, may be negotiated under the provisions of Article 6 of the Convention, as well as under the inherent sovereign rights of the belligerents.[98]

B. *WORKING HOURS, HOLIDAYS, AND VACATIONS*

Article 53 of the 1949 Convention covers all aspects of the time periods of prisoner-of-war labor. As to the duration of daily work, it provides that (1) this must not be excessive; (2) it must not exceed the work hours for civilians in the same district; (3) travel time to and from the job must be included; and (4) a rest of at least one hour (longer, if civilian nationals receive more) must be allowed in the middle of the day.

It thus appears that the new Convention contains the same prohibition as its predecessor against daily labor which is of "ex-

[96] In PICTET, COMMENTARY 296, the argument is made, and with considerable merit, that escape is an act of war and that only military personnel of the Detaining Power are authorized to respond to this act of war with another act of war—the use of weapons against a prisoner of war. This theory finds support in the safeguards surrounding the use of weapons against prisoners of war, especially those involved in escapes, found in Art. 42 of the 1949 Convention.

[97] See, *e.g.*, the World War I agreements listed in note 19 *supra*, and Lauterpacht, *The Problem of the Revision of the Laws of War*, 29 BRIT. YB. INT'L. L. 360, 373 (1952).

[98] By becoming parties to the Convention they have given up their sovereign right to enter into special agreements adversely affecting the rights guaranteed to prisoners of war by the Convention.

cessive" duration. Here, again, we have the application of the national standard, and in an area in which such standard had proved to be disadvantageous to prisoners of war during World War II.[99] The Greek Delegation to the Diplomatic Conference attempted to obtain the establishment of an international standard—a maximum of eight hours a day for all work except agriculture, where a maximum of ten hours would have been authorized. This proposal was overwhelmingly rejected.[100] As has already been pointed out with regard to other problems, where a national rather than an international standard has been adopted, very few nations at war could afford to grant to prisoners of war more favorable working conditions than those accorded their own civilian citizens.[101] With respect to hours of daily work, it must be noted, too, that the limitations contained in the article cannot be circumvented by the adoption of piece work, or some other task system, in lieu of a specific number of working hours. The Convention specifically prohibits rendering the length of the working day excessive by the use of this method.[102]

The provision for a midday rest of a minimum of one hour is new and is only subject to the national standard if the latter is more favorable to the prisoner of war than the international standard established by the Convention. It may be necessary for the Detaining Power to increase the midday rest period given to prisoners of war, if its own civilian workers receive a rest period in excess of one hour, but it may not, under any circumstances, be shortened to less than one hour.

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[99] Statement of Mr. R. J. Wilhelm, the representative of the International Committee of the Red Cross, in IIA FINAL RECORD 275.

[100] IIB *id.* at 300.

[101] The Conference of Government Experts called by the ICRC in 1947 had originally considered setting maximum working hours, but finally decided against it as being "discrimination in favour of PW, which would not be acceptable to the civilian population of the DP." REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS 176 (1947). As stated in Anon., *The Conditions of Employment of Prisoners of War: The Geneva Convention of 1929 and its Application*, 47 INT'L. LABOUR REV. 169, 194 (Feb. 1943): "The prisoner cannot expect better treatment than the civilian workers of the Detaining Power. . . . His fate depends upon the extent to which the standards of the country where he is imprisoned have been lowered through the exigencies of the war."

[102] During World War II, many countries used the piece or task-work method of controlling prisoner-of-war labor. PICTET, COMMENTARY 282; Anon., *The Employment of Prisoners of War in Canada*, *supra* note 61, at 337. In the United States the piece-work system was used, but to control pay rather than work hours. LEWIS, HISTORY 120–121. As long as the pay does not drop below the minimum prescribed by the Convention, there would appear to be no objection to this procedure.

Article 53 further provides that prisoners of war shall be entitled to a 24-hour holiday every week, preferably on Sunday "or the day of rest in their country of origin." Except for the quoted material, which was adopted at the request of Israel but which should be of equal importance to the pious Moslem, a similar provision was contained in the 1929 Convention. This provision is not subject to national standards, whether or not the national standard is more liberal.[103] And finally, this same article grants to every prisoner of war who has worked for one year a vacation of eight consecutive days with pay. This provision is new and is of a nature to create minor problems, as, for example, whether normal days of rest are excluded from the computation of the eight days, what activity is permitted to the prisoner of war during his "vacation," and what he may be required to do during this period. However, despite these administrative problems, the provision should prove a boon to every person who undergoes a lengthy period of detention as a prisoner of war.

C. *COMPENSATION AND OTHER MONETARY BENEFITS*

The 1929 Convention provided, in Article 34, that prisoners of war would be "entitled to wages to be fixed by agreements between belligerents." No such agreements were, in fact, ever concluded.[104] The comparable provision of the 1949 Convention (Article 62) provides for "working pay" [105] in an amount to be fixed by the Detaining Power, which may not be less than one-fourth of one Swiss franc for a full working day.[106] The amount so fixed must

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[103] Nor was it subject to national standards in the 1929 Convention, but the Germans refused to accord prisoners of war a weekly day of rest on the ground that the civilian population did not receive it. Janner, *supra* note 63.

[104] PICTET, COMMENTARY 313; ICRC REPORT 286.

[105] Actually, Art. 62 refers to "working rate of pay" twice and to "working pay" four times, while Arts. 54 and 64 refer only to "working pay." The term "indemnité de travail" is used in the French version of all of these articles and the difference in English appears to be an error in drafting. The report of the Financial Experts at the 1949 Diplomatic Conference (IIA FINAL RECORD 557) states:

"It appeared that the expression 'wages' was inappropriate and might give the impression that prisoners of war while fed and housed at the cost of the Detaining Power were in addition being renumerated for their work at a rate corresponding to the remuneration of a civilian worker responsible for maintaining himself and his family out of his wages. For this reason, it was decided to substitute the terms 'working pay' wherever this was necessary."

[106] The inadequacy of the minimum set by the Convention, which amounts to approximately six cents a day in money of the United States (approximately 5 d. in British money), is illustrated by the fact that almost a century ago, in 1864, during the American Civil War, the Federal Government set the rate of prisoner-of-war pay at ten cents a day for the skilled and five

be "fair" and the prisoners of war must be informed of it, as must the Protecting Power.

With regard to the establishment by the Detaining Power of a "fair working rate of pay," several matters should be noted. First, no basis can be seen for attempting to determine what is "fair" by endeavoring to compare the "working pay" of prisoners of war with the wages of civilian workers. There are too many diverse and unequal factors involved;[107] the extremely nominal minimum set by the Convention is clearly indicative of the fact that there was no intention on the part of the Diplomatic Conference to establish any such relationship. Second, while there appears to be nothing to preclude a Detaining Power from establishing a fair basic "working rate of pay," and then providing for amounts in addition thereto for work requiring superior skill or heavier exertion or greater exposure to danger, or as a production incentive, no authority exists for establishing different working rates of pay for prisoners of war of different nationalities who have the same competence and are engaged in the same type of work.[108] And finally, the rate established as "fair" may not thereafter be administratively reduced by having a part of it "retained" by the camp administration. The authority for this procedure, which was contained in Article 34 of the 1929 Convention, has been specifically and intentionally deleted from the 1949 Convention.

There is one provision of the new Convention which could render this entire subject moot. An individual account must be kept for each prisoner of war. All of the funds to which he becomes entitled during the period of his captivity, including his working pay, are credited to this account and all the payments made on his behalf or at his request are deducted therefrom (Article 64). Under Article 34 of the 1929 Convention it then became the obligation of the Detaining Power to deliver to the prisoner of war "the pay remaining to his credit" at the end of his captivity.

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cents a day for the unskilled! LEWIS, HISTORY 39. During World War II the United States paid prisoners of war 80 cents a day. *Id.* at 77. Under the incentive of the piece-work system it was possible to increase this to $1.20 a day. *Id.* at 120.

[107] For some of these differences, see the quotation in note 105 above, and Mojonny, *The Labor of Prisoners of War* 24, 1954 (unpublished thesis, at Indiana University). For a contrary view, see PICTET, COMMENTARY 115.

[108] During World War II the Germans habitually paid Soviet prisoners of war as little as one-half of the amount paid to prisoners of war of other nationalities. DALLIN, GERMAN RULE IN RUSSIA 423, 425 (1957). Art. 16 of the 1949 Convention specifically prohibits "adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

Under Article 66 of the 1949 Convention, upon the termination of the captivity of a prisoner of war, it will be the responsibility of the Power in whose armed forces he was serving at the time of his capture, and *not* of the Detaining Power, to settle any balance due him. Under these circumstances, there appears to be little reason why a Detaining Power should not be extremely generous in establishing its "fair working rate of pay." In effect, it will, for the most part, merely be creating a future liability on the part of its enemy! This factor may result in the negotiation of agreements between belligerents fixing mutually acceptable "working rates of pay," despite the lack of a specific provision for such agreements in the 1949 Convention—agreements which, as has been noted, were not reached under the 1929 Convention where there was specific provision for them.

A number of changes have been embodied in the 1949 Convention with regard to the types of work which entitled a prisoner of war to working pay. Of major importance is the fact that, while Article 34 of the 1929 Convention specifically provided that "prisoners of war shall not receive wages for work connected with the administration, management and maintenance of the [prisoner-of-war] camps," Article 62 of the present Convention is equally specific that prisoners of war "permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps" *will be* entitled to working pay. This article also contains a specific provision under which non-medical service medical personnel (Article 32), and retained medical personnel and chaplains (Article 33) are entitled to working pay. And while the prisoners' representative and his advisers are, primarily, paid out of canteen funds, if there are no such funds, these individuals, too, are entitled to working pay from the Detaining Power. Finally, because enlisted men assigned as orderlies in officers' camps are specifically exempted from performing any other work (Article 44), it appears that they should be entitled to working pay from the Detaining Power.[109]

What of the prisoner of war who is the victim of an industrial accident or contracts an industrial disease and is thereby incapacitated, either temporarily or permanently? Does he receive any type of compensation, and, if so, what, when, from whom, and how?

The Regulations attached to the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907 were silent on this

[109] This was the policy followed by the United States during World War II. Prisoner of War Circular No. 1, *supra* note 31, § 85.

problem. The multilateral prisoner-of-war agreement negotiated at Copenhagen in 1917 adopted a Russian proposal which placed upon the Detaining Power the same responsibility in this regard that it had towards its own citizens; but the British-German agreement, which was negotiated at The Hague in 1918, provided merely that the Detaining Power should provide the injured prisoner of war with a certificate as to his occupational injury.[110] The procedure adopted at Copenhagen was subsequently incorporated in Article 27 of the 1929 Convention, and in 1940, after some abortive negotiations with the British, Germany enacted a law implementing this procedure.[111] The United States subsequently established this same policy,[112] but the United Kingdom considered that it was only required to furnish the injured prisoner of war all required medical and other care.[113]

Inasmuch as no payments were ever, in fact, made to injured prisoners of war by the Detaining Powers after their repatriation,[114] it is not surprising that in drafting the pertinent provisions of the 1949 Convention the Diplomatic Conference replaced the 1929 procedure with one more nearly resembling that which had been adopted by the British and Germans at The Hague in 1918.[115] It may actually be asserted that there is little difference between the previous practice and the present policy.

The procedure established by the 1949 Convention is contained in the somewhat overlapping provisions of Articles 54 and 68. When a prisoner of war sustains an injury as a result of an industrial accident (or incurs an industrial disease), the Detaining Power has the obligation of providing him will all required care,

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110 FLORY, PRISONERS OF WAR 79–80 (1942). The prisoner-of-war agreement concluded between France and Germany in 1915 had still a different approach: it provided that, upon repatriation, prisoners of war who had suffered industrial accidents would be treated as wounded combatants. Rosenberg, *International Law Concerning Accidents to War Prisoners Employed in Private Enterprises*, 36 A.J.I.L. 294, 297 (1942).

111 Lauterpacht, *supra* note 97. Lauterpacht labels the negotiations as "elaborate" and as "concerning the relatively trivial question of the interpretation of Article 27."

112 Prisoner of War Circular No. 1, note 31 above, §§ 91 and 92; MacKnight, *The Employment of Prisoners of War in the United States*, 50 INT'L. LABOUR REV. 47, 63 (July, 1944).

113 Lauterpacht, *supra* note 97.

114 LEWIS, HISTORY 156.

115 In the British MANUAL OF MILITARY LAW, *supra* note 95, § 185, n. 1, the statement is made that during the World War II negotiations the United Kingdom "considered that its domestic workmen's compensation legislation was too complex and so bound up with the conditions of free civilian workmen as to make it impracticable to apply it to prisoners of war." That position has become no less valid with the passing of the years since the end of that war.

medical, hospital, and general maintenance during the period of his disability and continuation in the status of a prisoner of war.[116] The only other obligation of the Detaining Power is to provide the prisoner of war with a statement, properly certified, "showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment." Also, a copy of this statement must be sent to the Central Prisoners of War Agency. This latter action insures its permanent availability.

If the prisoner of war desires to make a claim for compensation while still in that status, he may do so, but his claim will be addressed, not to the Detaining Power, but to the Power on which he depends and will be transmitted to it through the medium of the Protecting Power.[117] The Convention makes no provision for the procedure to be followed beyond this point, probably for the reason that the problem is a domestic one which would be inappropriate for inclusion in an international convention. Nevertheless, it may well be that, in the long run, the present policy, by transferring responsibility to the Power upon which he depends, upon the repatriation of the prisoner of war, will prove of more value to the disabled prisoner of war than the apparently more generous policy expressed in the 1929 Convention.[118]

D. *GRIEVANCE PROCEDURES*

In general, any prisoner of war who believes that the rights guaranteed to him by the 1949 Convention are, in any manner whatsoever, being violated in connection with his utilization as a source of labor, would have the right to avail himself of any of the channels of complaint established by the Convention: to the rep-

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[116] Arts. 40 and 95 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (6 U.S.T. & O.I.A. 3516, 75 U.N.T.S. 287 (I:973)) place upon the Detaining Power the additional burden of providing compensation for occupational accidents and diseases. The variation between the two conventions was noted by the Co-ordination Committee of the Diplomatic Conference (IIB FINAL RECORD 149), but Committee II, to which had been assigned the responsibility for preparing the text of the prisoner-of-war convention, determined that such a provision was not necessary for prisoners of war (IIA FINAL RECORD 402).

[117] The suggestion has been made that, "since under Article 51, paragraph 2, he [the prisoner of war] is covered by the national legislation [of the Detaining Power] concerning the protection of labor," a prisoner of war disabled in an industrial accident or by an industrial disease would, while still a prisoner of war, be entitled to benefit from local workmen's compensation laws. PICTET, COMMENTARY 286–287. It is believed that the application of this general provision of the Convention has been restricted in this area by the specific provision on this subject.

[118] Anon., *The Conditions of Employment of Prisoners of War*, *supra* note 101, at 182; PICTET, *op. cit. supra* note 117.

resentatives of the Protecting Power (Articles 78 and 126); to the prisoners' representatives (Articles 78, 79, and 81); and, perhaps to representatives of the International Committee of the Red Cross (Articles 9, 79, 81, and 126).[119] Nevertheless, the Diplomatic Conference felt it advisable to include in Article 50 (which lists the classes of authorized labor) a specific provision permitting prisoners of war to exercise their right of complaint, should they consider that a particular work assignment is in a prohibited industry. It is somewhat difficult to perceive the necessity for this provision or that it adds anything to the general protection otherwise accorded to the prisoner of war by the appropriate provisions of the Convention. In fact, the danger always exists that by this specific provision the draftsmen may have unwittingly diluted the effect of the general protective provisions in areas where no specific provision has been included.

VII. CONCLUSION

Utilization of prisoner-of-war labor means increased availability of manpower and a reduction in disciplinary problems for the Detaining Power, and an active occupation, better health and morale, and, perhaps, additional purchasing power for the prisoners of war. It is obvious that both sides will have much to gain if all the belligerents comply with the labor provisions of the 1949 Convention.

On the whole, it is believed that these labor provisions represent an improvement in the protection to be accorded prisoners of war in any future conflict. True, they contain ambiguities and compromises which can serve any belligerent which is so minded as a basis for justifying the establishment of policies which are contrary to the best interests of the prisoners of war detained by it and which are probably contrary to the intent of the drafters. However, it must be assumed that nations which have ratified or adhered to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, many of which were likewise involved in its drafting, will, to the maximum extent within their capabilities, implement it as the humanitarian charter which it was intended to be. And, in any event, two factors are always present which tend to call forth his type of implementation: the presence of the Protecting Power and the doctrine of reciprocity.[120] Information

[119] The availability of the latter as a channel of complaint is not clearly defined. Levie, *op. cit. supra* note 63, at 396.

[120] The activities of the International Committee of the Red Cross are likewise a major deterrent to the improper application of the Convention.

as to the interpretation and implementation of the Convention by a belligerent is made known to the other side through the Protecting Powers and thus becomes public knowledge with the resulting effect, good or bad, on world public opinion. Policies which, while perhaps complying with a strict interpretation of the Convention, are obviously overly restrictive in an era where a more humanitarian attitude appears justified and could easily be employed, will undoubtedly result in the adoption of an equally or even more restrictive policy by the opposing belligerent. Such retorsion can easily lead to charges of reprisals, which are outlawed, and thus create a situation which, whether or not justified, can only result in harm to all of the prisoners of war held by both sides. While there were nations which, during World War II, appeared to be disinterested in the effect that their treatment of prisoners of war was having on the treatment received by their own personnel detained by the enemy, it is to be hoped that in any future war, even one which represents the "destruction of an ideology," [121] at the very least, concern for the fate of its own personnel will cause each belligerent to apply the doctrine *pacta sunt servanda* scrupulously in establishing policies which implement, among others, the labor provisions of the Geneva Prisoner of War Convention of 1949.

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[121] Statement of German General Keitel, quoted in the *Opinion and Judgment of the International Military Tribunal*, 41 A.J.I.L. 172, 228–229 (1947).

COMMENTS

PERMISSIBLE BOUNDS OF STAFF JUDGE ADVOCATE PRETRIAL ACTIVITY.* The staff judge advocate in the initial stages of a criminal investigation, and subsequently in the initial stages of a case that has been referred to trial by general court-martial, often desires or finds himself called upon to render assistance to the prosecutorial arm of Government. For example, the staff judge advocate frequently renders advice and assistance to military police investigators in the initial stages of a criminal investigation, and in subsequent stages of the case to the Article 32 investigating officer and to the trial counsel. The unwary staff judge advocate who renders too much "advice and assistance" in this regard may find himself so aligned with the prosecution of the case that he has become a "prosecution mentor," and hence ineligible to serve further in the case as a staff judge advocate. While situations of this sort confront staff judge advocates on an almost daily basis, the law in the area is none too clear. It is the purpose of this comment to inquire into the limits of permissible conduct in this area of staff judge advocate activity.[1]

I. THE SCOPE OF ARTICLE 6(c)

Judge Ferguson of the United States Court of Military Appeals, perturbed over what he believes to be partisan advocacy on the part of staff judge advocates, recently wrote:

> We simply must face up to the facts in the administration of military law. Staff judge advocates act and behave in case after case as if they were attorneys for the United States, with their sole objective being the production of a legally sustainable conviction and adequate sentence.[2]

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] Situations involving the improper influencing of court members by the staff judge advocate, more commonly referred to as "command influence" cases are without the scope of this comment and have been discussed elsewhere. See, *e.g.*, *Survey of the Law—Military Justice*, 3 MIL. L. REV. 67–115 (1959); Sides and Fisher, *A Supplement to the Survey of Military Justice*, 8 MIL. L. REV. 113–146 (1960); Craft and Day, *A Supplement to the Survey of Military Justice*, 16 MIL. L. REV. 91–136 (1962); Mittelstaedt and Barrett, *A Supplement to the Survey of Military Justice*, 20 MIL. L. REV. 107–165 (1963).

[2] United States v. Dodge, 13 USCMA 525, 530, 33 CMR 57 (1963).

This type of behavior, Judge Ferguson concluded, disqualifies the staff judge advocate from further participation in the case, including both pretrial advice and post-trial review functions of the case. While Judge Ferguson's observations on the partisan advocacy of staff judge advocates may or may not be wide of the mark, there is considerable authority to support his conclusion pertaining to the disqualification of a staff judge advocate who has demonstrated a partisan interest in a particular case.

The Article of the *Uniform Code of Military Justice*[3] most directly concerned with this situation, Article 6(c), provides:

> No person who has acted as . . . trial counsel . . . or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any *reviewing* authority upon the same case. (Emphasis added.)

Before entering into a discussion of the various pretrial activities of the staff judge advocate that may be in violation of the provisions of Article 6(c), *supra*, it is pertinent to inquire into the scope of the Article. Does the Article apply only to *post-trial* review of the case by the staff judge advocate, as its plain language seems to indicate, or in an appropriate case may it also bar the staff judge advocate from writing the pretrial advice as well? The distinction is one of significance. Obviously, if only post-trial review functions are barred to a staff judge advocate who has over-stepped the bounds of impartiality, corrective action would be limited to directing a new post-trial review of the case by a different staff judge advocate, a not too bothersome task for the administrators of military justice to perform. If, on the other hand, pretrial advice functions are also barred a different situation is presented. Here the conviction itself may well be reversed and a new pretrial advice ordered from a different staff judge advocate, with a direction to the convening authority that he may order a rehearing after consideration of the new pretrial advice. The question as to the scope of Article 6(c) is thus one of utmost importance.[4]

The plain language of the Article, as mentioned previously, indicates that it is limited to post-trial review functions of the staff judge advocate. Two provisions of the *Manual for Courts-*

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[3] Hereinafter referred to as the Code and cited as UCMJ.

[4] The importance of this Article is further emphasized by the fact that a violation of the Article will support a finding of general prejudice by the Court of Military Appeals. See Judge Ferguson's dissent in United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962), and Chief Judge Quinn's decision in United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1954).

Martial[5] indicate a contrary interpretation. Paragraphs 35*b* and 85*a* of the Manual, while almost identical in language to Article 6(c), provide essentially that the scope of the Article's prohibition applies equally well to both pretrial advice and post-trial review functions of the staff judge advocate.[6] An Air Force Board of Review and the Court of Military Appeals have rendered decisions consistent with the Manual interpretation of Article 6(c). The Air Force Board of Review stated:

> That the Article is equally applicable to pretrial as well as post-trial proceedings . . . we have no doubt (MCM, 1951, par. 35*b*).[7]

The Court of Military Appeals in *United States v. Mallicote*,[8] while not as clear cut as the Air Force Board of Review decisions, *supra*, supports the Manual interpretation. The Court stated in this regard that Article 6(c) "prohibits persons who act in one capacity 'in any case,' from *thereafter* performing duties in an inconsistent capacity 'in the same case.'" (Emphasis added.) Judge Kilday, the author judge, continued, quoting from the *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, at page 138 as follows:

> Although not mentioned in Article 6(c), it follows that any person who has acted in a partisan capacity . . . should not act *subsequently* as the staff judge advocate or legal officer in the same case (Emphasis added.)

The scope of this language would tend to include both pretrial advice and post-trial review functions of the staff judge advocate within the provisions of Article 6(c).

Other decisions of the Court of Military Appeals support this conclusion generally,[9] while still others indicate the Article applies only to post-trial review functions.[10] The most clear cut pro-

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[5] Paragraph 35*b* provided in pertinent part: "No person who has acted as investigating officer, law officer, or member of the court, prosecution, or defense in any case shall subsequently act as staff judge advocate or legal officer in the same case. See Article 6(c)." Paragraph 85*a* provides in pertinent part: "No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing (convening) authority upon the same case (Art. 6*c*)." (Parenthetical comment not added.)

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter referred to as the *Manual* and cited as MCM, 1951].

[7] ACM 13978, Powell, 24 CMR 835, 838 (1957).

[8] 13 USCMA 374, 32 CMR 374 (1962).

[9] See United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958); United States v. Hightower, 5 USCMA 385, 18 CMR 9 (1955).

[10] Article 6(c) "is designed to assure a fair and impartial review." United States v. Clisson, 5 USCMA 277, 17 CMR 277 (1954). The purpose of the Article is to "insure strict impartiality in the first level review." United

nouncement on the matter, however, is found in *United States v. Dodge*,[11] decided 15 March 1963, wherein Chief Judge Quinn in a footnote defined the scope of the Article as follows:

> While Article 6(c) . . . refers to "reviewing authority," the term is generally used interchangeably with the term "convening authority." Manual for Courts-Martial, United States, 1951, paragraph 84 [*sic*]. See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 121. We assume, therefore, for present purposes that the Article prohibits an investigator from subsequently acting as staff judge advocate for the pretrial advice.[12]

Chief Judge Quinn and Judge Kilday, who concurred in the Chief Judge's opinion without comment, affirmed the conviction in *Dodge, supra*, but Judge Ferguson dissented on the basis that the particular pretrial activity of the staff judge advocate concerned was impermissible within the bounds of impartiality. Judge Ferguson concluded that he would reverse "the board of review, set aside the findings and sentence, and order a [new pretrial advice], after which the convening authority would be empowered to order a rehearing on the charge and specification."

It would thus appear that the scope of Article 6(c) was fairly well understood by all three judges of the Court of Military Appeals to include both the pretrial advice and post-trial review functions of the staff judge advocate, as announced in *Dodge, supra*. This unanimity of understanding, however, was short lived. *Dodge* was handed down by the Court on 15 March 1963. Two weeks later, on 29 March 1963, the Court announced its decision in *United States v. Smith*.[13] Here Judge Kilday, writing for the Court, gave every indication of not having read Chief Judge Quinn's footnote in *Dodge*. He wrote that it was "pure speculation" as to whether the framers of the Manual intended to apply Article 6(c)'s prohibitions to the pretrial advice as well as to the post-trial review. He quoted paragraph 35*b* of the Manual in support of this contention, and concluded that the framers of the Manual were "markedly silent" in that paragraph as to whether or not they intended to interpret Article 6(c)'s use of the term "reviewing authority" as applying to anything other than post-trial proceedings.[14] Chief Judge Quinn, who wrote the

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States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954). The purpose of the Article is to insure "the accused a thoroughly fair and impartial review." United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1954).

[11] 13 USCMA 525, 33 CMR 57 (1963).

[12] *Id.* at 527.

[13] 13 USCMA 553, 33 CMR 85 (1963).

[14] Had Judge Kilday read the second provision of the Manual which pertains to the scope of Article 6(c), that is, paragraph 85*a* he would not

majority decision in *Dodge*, blandly concurred in Judge Kilday's opinion in *Smith* without comment. Judge Ferguson, however, remained consistent with his previously announced views as to the scope of Article 6(c). While he concurred in the result in *Smith*, he noted "it was erroneous for the staff judge advocate to act as he did and thereafter to *advise* the *convening* authority on the charges." (Emphasis added.)

Despite the state of confusion pertaining to the scope of Article 6(c) as brought on by the *Dodge* and *Smith* cases, it is submitted that Chief Judge Quinn and Judge Ferguson are nonetheless in accord on the meaning and scope of Article 6(c). In view of their expressed opinion on this matter, and in view of the inherent weakness of Judge Kilday's opinion in *Smith*, Chief Judge Quinn and Judge Ferguson should have no hesitation when confronted with the issue in an appropriate case (where the partiality of the staff judge advocate was demonstrated *prior* to the writing of the pretrial advice) in holding that the Article applies to both pretrial advice and post-trial proceedings.

The time factor (whether the alleged disqualifying act of the staff judge advocate occurred before or after the pretrial advice) should be kept in mind in the subsequent discussion of specific cases. In many instances in the succeeding cases the disqualifying act occurred *after* the pretrial advice had been written. Accordingly, the only issue in those cases was whether the staff judge advocate was barred from writing the post-trial review. In these cases, however, it should be borne in mind that had the disqualifying act of partiality occurred *before* the pretrial advice was written, the issue would have (or should have) included the full scope of Article 6(c), namely, whether the staff judge advocate was barred from writing both the pretrial advice and post-trial review.

A. *ASSISTING THE PROSECUTION*

There is general support for the proposition that the staff judge advocate may give assistance to the trial counsel.[15] Actual case

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have observed such "marked silence." The framers of the Manual, in paragraph 85*a*, very definitely interchanged the term "convening authority" with the term "reviewing authority," a factor which Chief Judge Quinn expressly commented upon in his footnote in *Dodge*, *supra*, wherein he held the scope of the Article included both pretrial and post-trial review functions of the staff judge advocate.

[15] The staff judge advocate "must be available to assist those who work under his direction." United States v. Smith, 13 USCMA 553, 33 CMR 85 (1963). The staff judge advocate's services "are available to all." In the

law on this point, however, deals primarily with situations where the staff judge advocate prior to trial had furnished trial counsel with a written memorandum for the trial of a particular case. Military appellate agencies have consistently held such written memoranda are permissible and do not bar the staff judge advocate from further participation in the case.[16] A review of these cases indicates that in writing memoranda to trial counsel, or in otherwise furnishing assistance to him, the staff judge advocate should give heed to the following pertinent questions:

(1) Has the staff judge advocate "gone so far in his advice or instruction to the trial counsel that reasonable men would impute to him such personal feeling or interest in the outcome of the case as to constitute him the true prosecutor"?[17]

(2) Is there a showing or indication that the staff judge advocate's interest in the case was anything other than an official interest in the prosecution of the accused?[18]

(3) Does the memorandum to trial counsel "establish an adversary relationship between (the staff judge advocate) and the accused"?[19]

(4) Does the memorandum "constitute an outline of trial strategy as opposed to an exhortation to effect a full and fair presentation of the evidence"?[20]

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preliminary stages of an investigation he is an "impartial advisor to both the Government and the accused." United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962). "He must make certain that both trial and defense counsel perform their duties in an appropriate manner and advise and consult with them on particular cases." Judge Latimer, dissenting in United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958). "... [H]e is charged with the technical supervision of the procedures pertaining to military justice; such supervision includes, but is not limited to, the proper instruction of less experienced officers who may be called upon to prosecute general court-martial cases." CM 365145, Haimson, 14 CMR 268 (1954). "... [I]t clearly appears that the trial counsel, as well as the defense counsel, in every general court-martial has the benefit of the staff judge advocate's advice, including proper trial procedures relative to any given case prior to trial." ACM–S 7080, Murphy, 12 CMR 912 (1953).

[16] See United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962); United States v. Judd, 11 USCMA 164, 28 CMR 388 (1960); United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954); United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954); ACM 9161, Austin, 16 CMR 930 (1954); ACM 8779, Ross, 16 CMR 579 (1954); CM 365145, Haimson, 14 CMR 269 (1954).

[17] ACM 8779, Ross, 16 CMR 579 (1954).

[18] United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954).

[19] United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).

[20] *Ibid.*

(5) Does the memorandum seek "to describe in detail the trial tactics most conducive to securing conviction in a particular case regardless of guilt or innocence"? [21]

(6) Does the memorandum indicate that the staff judge advocate had "predetermined the issue of guilt"? [22]

(7) Does the memorandum indicate that the staff judge advocate overstepped the bounds of impartiality and "became a 'member' of the prosecution"? [23]

(8) Was the tenor of the memorandum "instructive and not mandatory"? [24]

(9) Were both trial and defense counsel given a copy of the memorandum? [25]

(10) Lastly, is there anything in the pretrial advice or posttrial review that would indicate that either was anything except fair and impartial? [26]

While the principles in the foregoing questions exude fairness and impartiality, the Court of Military Appeals has been most liberal in approving pretrial memoranda to trial counsel, even in cases where the memoranda fairly exclude any reasonable possibility of basic fairness or impartiality on the part of the staff judge advocate concerned. Without further belaboring the issue, the reader's attention is invited to the detailed scope and content of the instructions to the trial counsel in the cases noted in the margin, wherein in each case the Court of Military Appeals affirmed the conviction.[27]

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[21] *Ibid.*

[22] United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954).

[23] United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962).

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] In *United States v. Mallicote*, 13 USCMA 374, 32 CMR 374 (1962), Judge Ferguson included a verbatim copy of the "Advice to Trial Counsel" in his dissent. The advice is six pages long and covers in detail such items as which prosecution witnesses should be called, including the substance of their testimony; expected defense issues and how they can be overcome by the prosecution; and other legal issues involved in the case and how they could be resolved in favor of the prosecution. In Judge Ferguson's words the advice "consists of a clearly partisan outline of trial strategy for the Government and informs counsel precisely how to insure that a strong case is presented. Not only does it mention no factor favorable to [the defense], but it actually anticipates defense issues and states methods of dealing with them. . . . In sum . . . the document here involved is a detailed trial brief and . . . its author . . . was disqualified to prepare a post-trial review." For similar cases on this point, see also United States v. Blau, 5 USCMA 232, 17 CMR 232 (1954); United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).

B. *DRAFTING CHARGES*

In *United States v. Smith*,[28] the defense alleged upon review that the staff judge advocate became a "combination prosecution advocate and investigating officer" because of his participation in the pretrial activities of the case, and hence ineligible under the provisions of Article 6(c) to write the pretrial advice on the charges. The defense alleged the staff judge advocate was barred from further participation in the case because he had personally drafted the charges, "based on his personal examination of the record prior to investigation under Article 32 of the Code," and by thereafter directing that the charges be taken to the accused's commanding officer to sign as the accuser. The Court of Military Appeals noted that in carrying out his pretrial duties, the staff judge advocate "must act in an impartial and independent capacity," but stated that by reason of his "position in the command and under the Code," he has other pretrial functions to perform. "In a general way," the position of the staff judge advocate was "likened to that of a district attorney." The Court observed further that he must be "available to assist those that work under his direction." The Court affirmed the conviction, holding that the fact that the "staff judge advocate personally drafted the charges prior to the Article 32 investigation does not deter us . . . . Someone in the command had to furnish [this service] and only the staff judge advocate himself was available."

The Court, however, reiterated a word of warning given in prior cases. The staff judge advocate, in performing his various pretrial functions, "must use his intelligence and experience to keep . . . from becoming at one stage of the proceedings so personally involved in the outcome as to preclude [his] acting at a later stage."[29] Judge Ferguson concurred in the result, but was of the opinion that "it was erroneous for the staff judge advocate [to draft the charges, etc.] and thereafter advise the convening authority on the charges."

C. *SECURING WITNESSES FOR THE PROSECUTION*

An "affiliation of advocacy" on the part of the staff judge advocate does not go hand in hand with the concept of military due process, and may bar the staff judge advocate from further acting

[28] 13 USCMA 553, 33 CMR 85 (1963).

[29] Similar admonitions were issued in United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962), United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957); United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).

in the case. Thus, where the staff judge advocate prevailed upon a prospective witness to testify for the prosecution, the Court of Military Appeals ruled that this action had the "ear marks of advocacy and zealous prosecution," and accordingly precluded the staff judge advocate from reviewing the case.[30] In a similar situation, however, where the staff judge advocate entered into an agreement with a prospective witness to plead guilty in return for an agreed upon maximum sentence, plus an agreement to testify against the accused following the witness' trial, the Court ruled the staff judge advocate was not disqualified to write the review of the case.[31] Judge Ferguson, in what appears to be the better reasoned opinion, dissented, stating that the staff judge advocate had secured the witness for the prosecution and should have been barred from writing the post-trial review accordingly. But in a more recent case, somewhat analogous to the above case, the Court of Military Appeals condemned an agreement between a convening authority and a prosecution witness wherein the witness' sentence was to be reduced one year for each occasion on which he testified against other co-accused.[32] The Court held this agreement was "repugnant to civilized sensibilities."

In *United States v. Turner*,[33] the staff judge advocate requested an accomplice, whose testimony was essential to convict the accused, take a lie detector examination prior to trial. After ascertaining that the results of the examination showed the accomplice was telling the truth, the staff judge advocate then referred him to the trial counsel "to arrange" for his testimony. The Court of Military Appeals ruled this "unusually close connection" with the case made it improper for the staff judge advocate to review the record. In a situation, however, where the staff judge advocate advised the trial counsel before (or during) the trial of the case of the availability of an essential prosecution witness, an Army Board of Review ruled such advice did not constitute the staff judge advocate the "procurer" of the witness, nor did it constitute him a member of the prosecution.[34]

In *United States v. Cash*,[35] the Court of Military Appeals held that a staff judge advocate who "procures a grant of immunity for a [prosecution] witness is disqualified from participating in the post-trial review." An Army Board of Review, however, re-

[30] See United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958).
[31] See United Statse v. Gilliland, 10 USCMA 343, 27 CMR 417 (1959).
[32] See United States v. Scoles, 14 USCMA 14, 33 CMR 226 (1963).
[33] 7 USCMA 38, 21 CMR 164 (1956).
[34] See CM 395606, Ortiz-Vergara, 24 CMR 315 (1957).
[35] 12 USCMA 708, 31 CMR 294 (1962).

cently refused to extend the rule to a situation where the accused pleaded guilty, and the witness for whom the immunity was obtained was not called upon to testify for the Government.[36] In this situation, the Board ruled the staff judge advocate who had secured the grant of immunity was not barred from writing the review.[37]

D. *ASSISTING THE INVESTIGATOR*

In the frequently cited case of *United States v. DeAngelis*,[38] the Court of Military Appeals ruled it was proper for a staff judge advocate, prior to charges, to accompany investigators to the locale of the crime and to render impartial advice to them. Chief Judge Quinn writing for the majority announced the rule as follows:

> Since a staff judge advocate is the administrator of military justice and discipline, it would be incongruous in the extreme were we to assume that he is unable to function at all unless and until charges have been preferred and investigated. Because of his position and knowledge of law he possesses, all members of the armed forces consult him when violations of the . . . Uniform Code of Military Justice occur . . . . Nor must a staff judge advocate sit idly by when he perceives a deficiency in the pretrial report of investigation. Whenever a report of investigation fails to disclose an essential element of the offense charged, the staff judge advocate must direct the attention of the investigating officer to the deficiency. If there is, in fact, no evidence of that element available, a proper reason for dismissing the charge arises. If it is available, it should be obtained and made a part of the report.[39]

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[36] See CM 408748, Green, decided 22 March 1963. For other cases of interest in the immunity area see United States v. Moffett, 10 USCMA 169, 27 CMR 243 (1959), and United States v. White, 10 USCMA 63, 27 CMR 137 (1958), wherein the Court of Military Appeals strongly inferred that in an appropriate case a convening authority who had granted immunity to a prosecution witness prior to the time charges are referred to trial, may well be precluded from referring the charges to trial. These cases are of interest herein primarily in that a parallel rule of exclusion could be applied to the staff judge advocate who recommends that a grant of immunity be made in such cases.

[37] An apparent distinction has arisen between the effect of pretrial activity on the referrel of a case to trial and the post-trial review of the record. *Compare United States v. Moffett*, 10 USCMA 169, 27 CMR 243 (1959) in which the court held that the granting of immunity to a prosecution witness does not *ipso facto* preclude a convening authority from thereafter referring a case to trial, because the only determination involved at that point is whether there is probable cause to believe that the accused is guilty of the crime charged, *with United States* v. *White*, 10 USCMA 63, 27 CMR 137 (1958) in which the court held that the same activity precluded the convening authority from reviewing the record after trial, because at that point he must weigh the evidence, pass on the credibility of witnesses, and satisfy himself from the evidence that the accused is guilty beyond a reasonable doubt.

[38] 3 USCMA 298, 12 CMR 54 (1953).

[39] *Id*, at 305, 12 CMR at 61.

Shortly after *DeAngelis* was announced by the Court of Military Appeals, an Army Board of Review cited it but proceeded to hold that a staff judge advocate had overstepped the bounds of permissible conduct where he personally continued and completed what he felt was an inadequate CID investigation. The Board of Review concluded that he violated the provisions of Article 6(c). The Board stated the officer had so injected himself in a partisan capacity into the investigation and preparation of the case for trial as to generate a "substantial risk that he would be unable to render a full, fair and impartial review of the record of trial." [40]

A year later an analogous situation was presented to the Court of Military Appeals. In *United States v. Schreiber*,[41] the staff judge advocate directed trial counsel to "prepare for trial" while the military police investigation of the case was still in progress. Because the investigation was in such a "jumbled-up mess" the trial counsel interviewed several witnesses and took additional statements. The same trial counsel thereafter prosecuted the case when it was referred to trial by general courts-martial. The defense argued on review that the trial counsel was barred from acting in the case as trial counsel because of his prior investigation of the case, in violation of Article 27(a) of the Code.[42] While the action of the staff judge advocate in appointing the trial counsel to the case in its investigative stages was not directly attacked, the Court of Military Appeals tacitly approved his action in the matter as it found the contention of the defense to be without merit, and affirmed the case.

In *United States v. Young*,[43] the Article 32 investigating officer, who was conducting a complicated investigation, asked the staff judge advocate to furnish him a legal advisor. The staff judge advocate complied, and the officer who was furnished as legal advisor was subsequently utilized as trial counsel in the same case. The Court of Military Appeals, noting that the investigating officer testified at the trial of the case that he had made "independent decisions" in the investigation, ruled that "while the Code does not authorize the trial counsel to be present (at the Article 32 investigation), it does not specifically prohibit his presence." The Court further held that the presence of the trial counsel so long as he did

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[40] CM 373477, Leo, 17 CMR 387 (1954).

[41] 5 USCMA 602, 18 CMR 226 (1955).

[42] Article 27(a) of the Code provides in pertinent part: "No person who has acted as investigating officer . . . in any case shall act subsequently as trial counsel."

[43] 13 USCMA 134, 32 CMR 134 (1962).

not encroach upon or displace the investigator in no way perverted the impartiality of the pretrial investigation. The Court noted that the complexity of the investigation had nothing whatever to do with its decision. The Court also announced the following rule:

> [I]t should be remembered that the investigation is in the nature of a preliminary hearing and, as with all judicial proceedings, its quest is truth. Methods which promote that end may not—when they do not interfere with the impartial scheme Congress has decreed for pretrial investigations—be seized upon by an accused to attack his conviction.[44]

Judge Ferguson dissented, stating that he would reverse the conviction and order a new pretrial investigation and trial.

The pretrial activity of the staff judge advocate was directly attacked in *United States v. Dodge*.[45] Here the defense argued that the staff judge advocate was a *de facto* investigating officer because prior to trial he had (1) made some 17 long distance telephone calls to prospective prosecution witnesses to ascertain the availability of a witness for trial and to verify the date an alleged offense occurred, and (2) subsequent to trial but prior to the post-trial review, he wrote a letter for the convening authority's signature addressed to the military investigating agency that had investigated the case, commending the "speedy and effective" action of the investigators concerned in the particular case. The defense contended that the staff judge advocate was accordingly barred by the provisions of Article 6(c) from writing either the pretrial advice or the post-trial review of the case. The Court of Military Appeals, citing *DeAngelis* ruled that the actions of the staff judge advocate in this regard did not constitute him either an investigator or a "prosecution mentor", nor did his actions "impair or destroy the fairness and impartiality of the proceedings against the accused." The Court ruled that he was not barred from writing either the pretrial advice or post-trial review. Judge Ferguson dissented, stating that in his opinion the staff judge advocate was disqualified to participate in either the pretrial advice or post-trial review.

In the most recent case in this field of law, an Army Board of Review was faced with a novel problem.[46] During the initial Article 32 investigation of a Lieutenant Colonel charged with numerous larceny by check offenses, and related dishonorable failure to pay just debt offenses, the investigating officer, lacking sub-

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[44] *Id*, at 139.
[45] 13 USCMA 525, 33 CMR 57 (1963).
[46] CM 408735, Smelley, decided 2 May 1963.

poena process,[47] was unable to secure sworn tesimony from prospective prosecution witnesses or the banking records of the accused. He accordingly submitted his report of investigation without the necessary testimony or banking records. The initial report of investigation was returned to the same investigating officer by command indorsement, which the Board of Review "assumed" was prepared by the staff judge advocate, directing him to reopen the investigation. The investigating officer was further advised that trial counsel, armed with full subpoena process (pursuant to the provisions of Articles 47 and 49 of the Code), had been appointed to the case for the purpose of taking depositions from reluctant witnesses and for the purpose of securing banking records of the accused. The investigating officer was also informed that in each instance he was appointed to serve as the officer before whom the depositions were to be taken. In the reinvestigation the reluctant witnesses and banking records were duly subpoenaed and depositions taken over the vigorous objection of defense counsel. At the trial of the case the defense moved to suppress all evidence uncovered by the depositions, and asked for a new pretrial investigation. These objections were overruled, and following the conviction were again raised before the Board of Review. The Board, citing *DeAngelis*, held that it was the staff judge advocate's duty to call attention to deficiencies in the pretrial investigation. The Board affirmed the conviction, holding that "the staff judge advocate may advise the investigator in the pretrial phases of a case without affecting the impartiality of his advice to the convening authority."

II. CONCLUSION

Under the provisions of Article 6(c), as previously noted, a staff judge advocate who oversteps bounds of permissible conduct in the pretrial stages of a case, may be barred from further participation in both the pretrial advice and post-trial review stages of the proceedings. This places a heavy burden of impartiality upon a staff judge advocate who must fulfill a variety of functions in the administration of military justice and discipline within a command. While he is looked upon as the person directly responsible for the proper trial and, if convicted, proper sentencing of persons brought to trial within the command by his commander,

[47] Subpoena process "cannot be used for the purpose of compelling a witness to appear at an examination before trial." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 115*a*. For a further discussion on this matter see generally Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 26–28 (1961).

he is nonetheless required by law to be impartial in the administration of military justice. The Court of Military Appeals has recognized the difficulty and inconsistency of his position, and while taking a fair and practical approach to the problem, has pointedly advised the staff judge advocate that he *must utilize his intelligence and experience not to jeopardize his further participation in the case by partisan advocacy for the prosecution at any one stage of the proceedings.*

In keeping with the above admonition, a knowledgeable (i.e., an intelligent) staff judge advocate may draft charges against an accused without violating the provisions of Article 6(c). For example, he may perform this service if no one else in his office is available, and if he is called upon by the accuser for this assistance. Under no circumstances (in the author's opinion), however, should he prepare charges on his own initiative and forward them unsolicited to another member of the command for action. In rendering assistance to the trial counsel the staff judge advocate must also utilize his intelligence and experience to avoid partisan advocacy. While he may furnish a detailed trial memorandum for the use of the trial counsel, his impartiality is demonstrated by furnishing a copy of the same memorandum to the defense counsel, etc. The acts of an impartial staff judge advocate in rendering assistance to trial counsel may well terminate at or close to this point, however. A knowledgeable staff judge advocate making a conscientious effort to remain impartial will not secure witnesses for the prosecution, or grant immunity to prosecution witnesses in contested cases. Nor (in the author's opinion), will he interview prosecution witnesses with a view toward assisting the trial counsel prepare them for trial; or write trial briefs or instructions on the law for the prosecution to be submitted to the law officer during the trial of the case; or intensively coach, drill and rehearse the prosecutor on trial techniques and strategy for a particular case.[48]

In appropriate situations a staff judge advocate may advise pretrial investigators, both criminal investigators and Article 32 investigators, without overstepping the bounds of propriety, provided his assistance is designed to "further the truth of the inquiry" and not merely to secure evidence of guilt. But here again

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[48] A similar argument could be directed at the staff judge advocate who orders his Chief of Military Justice to perform these same functions, unless he also has directed an equally knowledgeable member of his office to perform the exact services for the defense. A related question mark could also, under some circumstances, be directed at the impartiality of a staff judge advocate who refuses to obtain a grant of immunity for a *defense* witness.

he is called upon to utilize his intelligence and experience to avoid advocacy for the prosecution. He must not override or force conclusions upon the investigator, or use his position improperly to influence a recommendation for prosecution. He may furnish impartial assistance himself, or he may appoint a member of his office, including the future trial counsel, to assist the investigator without overstepping the bounds of impartiality proscribed by Article 6(c). He may not, however, personally interview witnesses, or take statements or otherwise complete a pretrial investigation himself, although it has been held unobjectionable for him to appoint a trial counsel for this purpose.[49]

While complete impartiality, from a practical viewpoint, on the part of a staff judge advocate may well be unobtainable,[50] the principles of intelligent reasoning and basic fairness are not unobtainable. The decisions of the Court of Military Appeals require primarily an intelligent, practical and fair approach to this problem by the staff judge advocate. The staff judge advocate who falls short through ignorance or otherwise and engages in partisan advocacy for the prosecution must be, and deserves to be, routinely exposed by alert trial defense counsel. On the other hand, the legal officer who makes a reasonably conscientious and intelligent effort to avoid partisan advocacy in the pretrial stages of a case, should find Article 6(c) no barrier to his further participation in the proceedings.

LUTHER C. WEST *

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[49] United States v. Schreiber, 5 USCMA 602, 18 CMR 226 (1955).

[50] "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will . . . . Only death yields complete dispassionateness, and such dispassionateness signifies utter indifference." Judge Frank, writing for the Court in *In Re* Linahan, 138 F2d. 650 (2d Cir. 1943), as quoted in United States v. Thomas, 3 USCMA 798, 14 CMR 216 (1954).

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SELECTIVE SERVICE LITIGATION SINCE 1960.* Following approval by the President on March 28, 1963, the duration of the Universal Military Training and Service Act[1] was extended by Congress for an additional four years ending July 1, 1967.[2] A prior extension expired July 1, 1963.[3]

This result was achieved in an amendment to Section 17(e) of the Act to extend for four years the authority to induct Selective Service registrants who have not been deferred. For the same length of time, there was extended the President's authority in Section 5(a) of the Act to select and induct physicians, dentists and allied specialists needed by the Armed Forces, and likewise his authority in Section 4(1) to order from the reserve components to active duty with the Armed Forces for 24 months if they have not reached the age of 35 years and have not previously served one year on active duty.

The purpose of this study is to seek to bring up to date a previous article in this publication by this writer discussing Selective Service until the year 1960.[4]

Certain legislative changes will be considered and there will be cited and discussed a rather extensive volume of litigation which has arisen under the Act during the past three years.

I. LEGISLATIVE CHANGES

Legislative amendment of the Act has been comparatively minor. Section 6(d)(1) has been amended and there was added a new section 6(d)(5) to permit a person who accomplished a ROTC program to accept a commission appointment in the Coast and Geodetic Survey in lieu of a commission in one of the other Reserve Components of the Armed Forces.[5]

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451–73 (1952) [hereinafter termed the Act].

[2] Pub. L. No. 88–2, 88th Cong., 1st Sess. § 1, 77 Stat. 4 (1963), 1963 U.S.C. CONG. & ADMIN. NEWS 378.

[3] 73 Stat. 13 (1959), 50 U.S.C. App. § 454 (Supp. I, 1959).

[4] *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35 (1961). Insofar as possible, there will be an avoidance of restating what is set forth in the article and to which the attention of the reader is respectfully directed.

[5] 76 Stat. 167 (1962), 50 U.S.C. § 456(d)(1), (5) (Supp. IV 1962).

Section 4(d)(3) of the Act has been amended to omit one sentence regarded as surplusage and to establish an eight-year service obligation for persons affiliating with the Armed Forces after June 19, 1951 and prior to August 10, 1959.[6]

Public Law 88–2 which gained the present four-year extension of the Act until 1967 also extends for a like four years, a suspension of law limiting the numerical strength of the Armed Forces,[7] and continues the 1950 Dependents Assistance Act,[8] and the law permitting additional special pay to physicians, dentists and veterinarians on active duty with the Armed Forces.[9]

II. SELECTIVE SERVICE NUMERICAL STRENGTH

The following table reflects the total numbers of registrants in each Selective Service classification in a nation-wide basis and also shows the various manpower classifications used in the Selective Service System as of June 1, 1963:[10]

Class	Number
Total Classified	24,849,841
I–A and I–A–O:	
Nonfathers:	1,717,909
Examined and Found Qualified	82,023
Not Examined	1,499,525
Not Available for Induction or Examination	133,562
Examination or Induction Postponed	2,799
Fathers 19 through 25	118,298
Registrants:	
26 and Older with Liability Extended	93,469
Under 19 Years of Age	151,546
I–Y	
Qualified Only in an Emergency	952,070
I–C	
Inducted	204,276
Enlisted or Commissioned	1,461,703
I–O	
Nonfathers:	
Examined and Found Qualified	955
Not Examined	7,175
Fathers	1,466

[6] 76 Stat. 506, 524–5 (1962), 50 U.S.C. § 454(d)(3) (Supp. IV 1962).

[7] These are achieved in 60 Stat. 92, (1946), (imposing restrictions on personnel strength of the Regular Navy and Marine Corps); 62 Stat. 605, Sec. 2, Title I of the Selective Service Act of 1948, as amended; and 64 Stat. 321 (1950).

[8] 64 Stat. 794 (1950), 50 U.S.C. App. §§ 2201–16 (1958).

[9] 63 Stat. 809 (1949), 37 U.S.C. § 234 (1958).

[10] "Selective Service," vol. XIII, No. 8, August 1963, p. 3, the Monthly Bulletin of National Headquarters of the Selective Service System, Washington 25, D. C.

Class		Number
I-W		
	At Work	2,165
	Released	5,534
I-D		
	Members of Reserve Component	901,649
I-S		
	Statutory Deferment:	
	High School	25,853
	College	2,288
II-A	Occupational Deferment (Except Agriculture)	111,819
II-A	Apprentice	5,862
II-C	Agricultural Deferment	16,469
II-S	Occupational Deferment (Student)	382,037
III-A	Dependency Deferment	2,386,270
IV-A	Completed Service: Sole Surviving Son	2,179,924
IV-B	Officials	47
IV-C	Aliens	8,487
IV-D	Ministers, Divinity Students	70,724
IV-F	Not Qualified for Military Service	2,573,951
V-A	Over Age of Liability	11,467,895

The following discloses the total numbers of registrants inducted into the Army through Selective Service from January 1960 through July 1963: [11]

1960	86,602 Inductees
1961	118,586
1962	82,060
1963	
January	4,327
February	4,396
March	8,977
April	9,913
May	9,681
June	4,247
July	6,879

The total of doctors, dentists and veterinarians called under the Act from January 1960 through July 1963 numbers 2,496.[12]

III. JUDICIAL REVIEW

The scope of judicial review of a local board's determination in the matter of a selective service registrant is perhaps best set forth in the language of Mr. Justice Clark in *Witmer v. United*

[11] Selective Service System, letter August 30, 1963. Note that only the Army receives men through the Selective Service System. The Navy and the Air Force rely upon recruitment which is stimulated by the impact of Selective Service upon all male registrants, 18–26 years.

[12] *Ibid.*

States.[13] The defendant, a member of Jehovah's Witnesses was convicted of failing to submit to induction into the Armed Forces in violation of Section 12(2) of the Act. At trial, the defendant urged that he was exempt as an alleged conscientious objector. The court declared:

> The primary question here is whether, under the facts of this case, the narrow scope of review given this Court permits us to overturn the Selective Service System's refusal to grant petitioner conscientious objector status. It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. The classification can be overturned only if it has "no basis in fact." *Estep v. United States*, 327 US 114, 122, 90 L ed 567, 573, 66 S Ct 423 (1946).[14]

It has been declared that in a Selective Service court case, the scope of judicial review into the administrative proceedings is "very limited" and the "range of review is the narrowest known to the law".[15]

The "clearly erroneous" rule applied in equity appeals has no place in review of a local board classification, nor has the "substantial evidence" rule of administrative review. Congress has not seen fit to give to the courts any general authority of revision of local board proceedings.[16]

The language of Mr. Justice Clark is indeed expressive in cautioning reviewing courts to avoid decisions which might be termed those of "super-draft boards". The difficulty arises where the reviewing court does not affirm the local board, but, rather, achieves a different result without, of course, regarding itself as a super-draft board.

The so-called "Witmer" rule has been applied in recent decisions. In *United States v. Tettenburn,*[17] the court convicted a registrant under the Act for knowingly failing to obey an order of his local board to report to the Crownsville State Hospital, Maryland, for an assignment to civil work in lieu of military service. The defendant claimed that he was an ordained minister since the age of eight years. The board classified the registrant as I–A and subsequently as I–O. The difficulty facing the local board as to

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[13] 348 U.S. 375 (1955).
[14] *Id.* at 380–1.
[15] See United States v. Blalock, 247 F. 2d 615 (4th Cir. 1957).
[16] *Ibid.; accord,* United States v. Van Hook, 284 F. 2d 489, 494 (7th Cir. 1960), *rev'd. on other grounds,* 365 U. S. 609 (1961).
[17] 186 F. Supp. 203 (D. Md. 1960).

the alleged miniterial status (IV–S) was that the defendant was regularly employed in secular work and had earned the sum of $5,300.00 within the past twelve months. The court quoted and relied upon *Blalock.*[18]

The principle inherent in *Witmer*[19] has been applied in numerous decisions. In 1959, the rule was discussed and followed in *United States v. Tamarkin.*[20]

IV. CONSCIENTIOUS OBJECTORS

In *United States* v. *Beaver,*[21] the defendant-registrant was convicted of refusing to be inducted into the military forces. The registrant tendered a Selective Service Conscientious Objector Questionnaire Form to the local board *after* he had been ordered to report for induction. The court held that a Conscientious Objector must claim exemption in accord with selective service regulations, and the local board need not reopen his case although at a late date he claims a Conscientious Objector exemption after previously remaining silent. Under the facts, the man registered September, 1954, and was classified I–A in April, 1957. On August 25, 1959, he was ordered to report for induction on September 9, 1959. On September 2, 1959, he requested that his case be reopened by the board in order that he might achieve an exemption.

In *Beaver,* a dissenting judge stated what is generally the minority weight of authority in this type of case:

> The statute gives this man exemption, the Army does not want him, the jail will not change his religious beliefs, nor will the will of the people to fight for their country be sapped by a generous adherence to the philosophy behind this law. *United States v. Underwood,* 151 F. Supp. 874 (E. D. Pa. 1955).[22]

A like decision with *Beaver* was arrived at in *United States v. Porter.*[23] A conviction was affirmed against an alleged Conscientious Objector who, being registered in 1954 and ordered on August 1, 1960 to report for induction on August 9, first claimed to be a Conscientious Objector on August 8, 1960. The defendant

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[18] United States v. Blalock, 247 F. 2d 615 (4th Cir. 1957).

[19] Witmer v. United States, 348 U. S. 375 (1955).

[20] 260 F. 2d 436 (5th Cir. 1958), *cert. denied,* 359 U.S. 925 (1959), *rehearing denied* 359 U.S. 976 (1959).

[21] 309 F. 2d 273 (4th Cir. 1962), *cert. denied,* 371 U.S. 951 (1963).

[22] *Id.* at 279.

[23] 314 F. 2d 833 (7th Cir. 1963); *accord,* United States v. Zasadni, 206 F. Supp. 318 (W. D. Pa. 1962).

urged unsuccessfully at trial that his declared conscientious objections had formed in January, 1960.

In *United States v. Keefer*,[24] the court was concerned with a Conscientious Objector who had worked with an aircraft company on military contracts. The court perceived that this factor, while not in itself decisive, cast doubt upon the sincerity of the registrant and may be considered by the local board as inconsistent with the registrant's claim to be opposed to participation in war in any form. In determining whether there is a basis in fact for the local board's classification, the court is confined to a review of the contents of the Selective Service file or cover sheet and may not go into alleged new evidence. A basis in fact may be found in the facts set forth in the Department of Justice recommendation and the FBI résumé since these are a part of the file. A conscientious objection classification is *based upon all religious beliefs of the particular individual* and not merely upon the tenets of the organization of which he is a member.

In *United States v. Corliss*,[25] three registrants were convicted for refusing to submit to induction. The conviction was affirmed on the ground that the evidence supported the Selective Service Appeal Board's denial of exemption as Conscientious Objectors. Any fact which casts doubt on the veracity of the registrant is relevant. Where personal sincerity is in issue, the Court of Appeals will accord weight to conclusions drawn by the local board after personal observance of the registrant.

In *Corliss*, one of the registrants, Herold, sought to enlist in the Naval Reserve in 1952. His Selective Service questionnaire form filed in 1952 did not assert that he was a Conscientious Objector. He applied for enrollment in military college in 1953. In May, 1954, he filed a Conscientious Objector form after receiving an induction notice. The court saw that the evidence supported the local board's rejection of exemption.

A prosecution for failure to report for civilian work in the national interest was before the court in *United States v. Moham-*

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[24] 313 F. 2d 773 (9th Cir. 1963); *accord*, United States v. Parker 307 F. 585 (7th Cir. 1962) (registrant employed in the manufacture of munitions), *rev'd. on other grounds*, 371 U. S. 938 (1963); United States v. Querengasser, 185 F. Supp. 114 (M.D. Pa. 1960).

[25] 173 F. Supp. 677 (1959), *aff'd*, 280 F. 2d. 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960) (3 judges would have granted writ). Compare United States v. Kretchel, 284 F. 2d 561 (9th Cir. 1960), where the defendant stated that he would fight in a heavenly war on the orders of Jehovah and was allowed a Conscientious Objector exemption because he was opposed to earthly wars.

med.[26] The court held that the local board properly refused to reopen the registrant's classification three days before he was to report for work and based upon his bare assertion that he had become entitled to a ministerial exemption, Class IV–D. The court stated: "The fact that defendant's predisposition to devote his time to his sect might be disturbed by the duties imposed by the selective service laws merely epitomizes the harsh reality of the age in which we live when military conscription is necessary to the national defense." [27]

In *Mohammed,* the defendant was a Muslim giving his services full time in a restaurant operated in Chicago by his sect. The registrant claimed to be a student for the Ministry at the University of Islam and an Assistant Minister in a Temple. The Temple of Islam exists apparently for Negroes.

In many registrations, the local board may allow a Conscientious Objector classification although the registrant insists that he is entitled to a ministerial exemption, IV–D. In most instances, a Jehovah's Witness will reject a Conscientious Objector classification and risk imprisonment if he is not accorded classification as a minister. This leads to considerable litigation under the Act.

V. MINISTERS OF RELIGION

Section 6(g) of the Act sets forth the following bases of exemption:

> Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title.

Sections 16(c)(2) and (3) of the Act by way of definition state:

> The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a chruch, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.
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> The term "regular or duly-ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the prin-

[26] 288 F. 2d 236 (7th Cir.), *cert. denied,* 368 U. S. 820, *rehearing denied,* 368 U.S. 922 (1961).
[27] *Id.* at 244.

ciples of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship, as embodied in the creed of principles of his church, sect, or organization.

Little difficulty has resulted in the application of exemption to an "ordained minister". Several sects, including the Jehovah's Witnesses, regard an active, male practitioner of the sect principles to be a minister. It would seem that the legislative intent was to apply the exemption more narrowly to the *leaders of a faith.*[28]

In *United States v. Kutz,*[29] a Jehovah's Witness was allowed exemption as a Conscientious Objector rather than as a minister. He had secular employment forty hours weekly as a wood cutter, and devoted 25 hours weekly in house-to-house calls for his sect plus 75 hours monthly in personal study. The court held that the evidence supported the Conscientious Objector classification, and that the local board did not act arbitrarily in refusing a IV–D as a minister.

In another case, the registrant sought classification either as a minister of Jehovah's Witnesses or a III-A deferment for family dependency on the basis of supporting his mother with whom he lived in a house trailer. He preached and taught 29 hours monthly and worked secularly from 47 to 70 hours weekly as a truck driver. The registrant rejected a Conscientious Objector classification (I–O) and refused to report for civilian work in a Grand Rapids hospital. The defendant was convicted and the appellate court upheld the trial court's determination that the I–O classification and the denial of IV–D or III–A "was predicated upon a basis in fact."[30]

Indicative of the practicality of a local board's classification is *United States v. Willard.*[31] The court held that classification as Conscientious Objector rather than as a Jehovah's Witnesses minister had a basis of fact in the record. The defendant was neither the presiding minister nor a first assistant minister. He had been ordained at the age of ten years, and 65 members of his sect was the largest group with which he was identified. *The group*

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[28] S. REP. No. 1268, 80th Cong., 2d Sess. 13 (1948), stressing that the exemption granted is a narrow one.

[29] 199 F. Supp. 205 (E.D. Wis. 1961).

[30] United States v. Clark, 307 F. 2d 1 (6th Cir. 1962).

[31] 312 F. 2d 605 (6th Cir. 1962), *cert. denied,* 372 U. S. 960 (1963).

of 65 members claimed seven ministers plus various assistants. Under the facts, a "Book Study Conductor" of Jehovah's Witnesses was not regarded as a minister.

In *United States v. Gallegos*,[32] three Jehovah's Witnesses were convicted of knowingly failing to perform a duty under the Act. The defendants refused to report for civilian work at the Los Angeles County Department of Charities. The court held that employment by a political subdivision of a state is proper and suitable for a registrant required to perform work in the national interest.

Presently, on appeal in the 4th Circuit is *United States v. Stewart*.[33] The trial court convicted a defendant for failing to report for assignment to civilian work and held that there was a "basis in fact" for the denial of ministerial exemption by the local board and the refusal of Conscientious Objector classification. The defendant was employed in secular work at a laundry on an eight-hour day basis at $1.00 hourly and had earned $2,200.00 in the past twelve months. He held titles in Jehovah's Witnesses as "Book Study Conductor", "Magazine Territory Servant," "Bible Study Servant," etc. The trial court in effect recognized that full-time secular work conflicts with an alleged full-time devotion to the practicing ministry.

The outcome at trial in *Stewart* is contrary to that arrived at by the court in *United States v. Wiggins*,[34] where the 5th Circuit Court allowed a "Book Study Conductor" of Jehovah's Witnesses to be classed as a minister in IV–D despite the circumstance that he was employed full time in secular work. Wiggins spent 40 hours weekly in secular employment and devoted 39 hours monthly to religious work. The court in *Wiggins* was misled apparently with respect to the opinion of the Supreme Court in *Dickinson v. United States*.[35] The court in *Wiggins* quoted language from *Dickinson* to the effect that a local board loses jurisdiction if there are insufficient facts in the record to support its conclusion.

This poses the weight of the evidence test. The quoted language was not in the majority opinion in *Dickinson*, but, rather, is to be found in Mr. Justice Jackson's dissent.

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[32] 285 F. 2d 700 (9th Cir.), *motion for new trial denied*, 295 F. 2d 879 (9th Cir. 1961), *cert. denied*, 368 U.S. 988 (1962); *accord*, United States v. LaPorte, 300 F. 2d 878 (9th Cir. 1962).

[33] 213 F. Supp. 497 (D. Md. 1963).

[34] 261 F. 2d 113 (5th Cir. 1958), *cert. denied*, 359 U.S. 942 (1959), *rehearing denied*, 359 U.S. 976 (1959).

[35] 346 U.S. 389 (1953).

Contrary to *Wiggins*, in the other Circuit Courts there is a unanimity of decision that *full-time secular employment precludes a ministerial classification.*[36]

Perhaps the *Stewart* case now on appeal may resolve the issue of whether or not full-time secular employment precludes ministerial exemption from military duty under the Act.

VI. THE EFFECT OF *TORCASO* v. *WATKINS*

In *Torcaso v. Watkins*,[37] the court struck down a provision in the Maryland Constitution which had required a declaration of belief in the existence of God in order to qualify for the office of notary public. The court reasoned that there was impeded the plaintiff's freedom of belief and religion. The court stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[38]

The Selective Service System has a significant interest in *Torcaso* as the case stands for the principle that a government cannot define the term "religion" with regard to the First Amendment if a definition omits any sociological, philosophical, humanitarian or political belief which a minority might designate as a religious belief. The Supreme Court rejected its own prior definitions of religion.[39]

Section 6(j) of the Act in allowing exemption to Conscientious Objectors expressly provides that:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being . . . , but does not include essentially political, sociological, or philosophical views or merely personal code.

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[36] See United States v. Bradshaw, 242 F. 2d 180 (10th Cir. 1957); United States v. Capehart, 237 F. 2d 338 (4th Cir.), *cert. denied*, 352 U.S. 363 (1957); United States v. Diercks, 223 F. 2d 12 (7th Cir.), *cert. denied*, 350 U.S. 81 (1955); United States v. Hill, 221 F. 2d 437 (7th Cir.), *cert. denied*, 349 U.S. 897 (1955).

[37] 367 U.S. 488 (1961).

[38] *Id.* at 495.

[39] See United States v. Macintosh, 283 U.S. 605 (1931); Davis v. Beeson, 133 U.S. 333 (1890); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

In a recent case[40] under the present Act, the court held that limiting the conscientious objection exemption to those asserting a belief in a Supreme Being is constitutional.

The issue which may eventually confront the Supreme Court is the conflict between the *Torcaso* decision which rejects a test or belief in a Supreme Being and the Conscientious Objector exemption under the Act which restricts exemption to one who can prove a belief in a Supreme Being.

An interesting sideline is that *Torcaso* was perhaps correctly decided by the Court, but upon the wrong grounds. The State of Maryland had required the oath of belief in God only from a very few office holders, including notaries, and had not exacted the oath from the vast majority of government officials including the Governor of the State. On its face, the classification was unreasonable and discriminatory against notaries and the court might have so concluded without a gratuitous determination as to a test linked to a belief in God.

VII. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A Selective Service registrant must exhaust all remedies allowed in the local board procedures including appeal to the higher Appeal Board of which there is at least one in each judicial district. A failure to appeal from his last classification by the Board will preclude the registrant from claiming that the last classification was improper.[41]

In *Pickens v. Cox*,[42] there was habeas corpus by a petitioner serving a general court-martial sentence following conviction of disobedience of a superior officer and absence without leave. The petitioner urged that as he was entitled to exemption under Section 6(o) of the Act as a sole surviving son (Class IV–A), the court-martial lacked jurisdiction over him. The court resolved that any applicable basis of exemption was waived by the petitioner who had failed to assert his claim to the Selective Service agencies and also omitted to invoke procedures available within the Army to obtain release after an erroneous induction.[43] The local board had full authority to cause the petitioner to be inducted into the military in the absence of his assertion of any

[40] United States v. Seeger, 216 F. Supp. 516 (S.D.N.Y. 1963).
[41] Donato v. United States, 314 F. 2d 67 (9th Cir. 1963).
[42] 282 F. 2d 782 (10th Cir. 1960).
[43] Army Regs. No. 615–635 (October 15, 1953).

special exemption to which he might be entitled, and thereafter the general court-martial had the necessary jurisdiction to try him for a military offense.

Where a defendant sought IV–D classification as a minister, but did not appeal from his I–O classification, the failure to appeal prevented him from raising the correctness of his classification as a defense in criminal prosecution.[44]

A local board is not required to examine a new claim for exemption by a Jehovah's Witness first advanced after he has refused induction into the military. Any possible basis of exemption was deemed abandoned by the registrant.[45]

VIII. ATTEMPTED DIVESTITURE OF CITIZENSHIP

In recent years, there has been an increasing number of cases concerned with the issue whether an alien who declines military service is thereafter excluded from citizenship and whether a citizen of the United States who flees the country to escape military service loses his citizenship.

Citizenship will be permanently denied to an alien who has received an exemption from military service in response to his application to be relieved from the military obligation under the provisions of the Naturalization Act.[46]

Where the alien is first allowed exemption by virtue of a treaty, and subsequently the treaty is abrogated and he performs military service, he is entitled to naturalization.[47] Where it is subsequently shown that the alien understood only elementary English at the time he signed the military exemption application, he is not excluded from naturalization.[48] If the alien was actually physically disqualified from military service, his exemption application will be disregarded and he may become naturalized.[49]

A registrant of Selective Service who requests and is granted classification IV–C as an alien exempt by treaty from military service, is thereafter ineligible to become a citizen with regard to

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[44] United States v. Osborn, 319 F. 2d 915 (4th Cir. 1963).

[45] United States v. Bonga, 201 F. Supp. 908 (E.D. Mich. 1962); *accord*, United States v. Cole, 205 F. Supp. 588 (W.D. N. Car. 1962).

[46] United States v. Keil, 291 F. 2d 268 (9th Cir. 1961); *In re* Rodriques, 193 F. Supp. 150 (N.D. Calif. 1961).

[47] United States v. Lacher, 229 F. 2d 919 (9th Cir. 1962); United States v. Hoellger, 273 F.2d 760 (2d Cir. 1960).

[48] *In re* Koplin, 204 F. Supp. 33 (D. Colo. 1962).

[49] *In re* Mirzoeff, 196 F. Supp. 230 (S.D. N.Y. 1961).

the provisions of Section 6(a) of the Act.[50] Section 6(a) restricts such exemption to the nationals of a country which grants reciprocal privileges to citizens of the United States.

Where the exempted alien withdraws his military exemption application and voluntarily serves for two years in the Army, he is eligible for citizenship.[51]

Even though the alien asserts that as a minor he was unduly influenced by his mother to claim military exemption, he is debarred from naturalization. There is no obligation on the local board to inform the alien that he might also have qualified for a student deferment under the Act.[52]

An *alien* registered with Selective Service is deportable where previously he left the United States to avoid service with the Armed Forces after being ordered to report for induction.[53]

A far reaching Supreme Court decision was achieved in *Kennedy v. Mendoza-Martinez*.[54] The court determined in a 5–4 decision pronounced by Mr. Justice Goldberg that a statute divesting a United States citizen of his citizenship because he left or remained outside of the country in time of war in order to evade military service is unconstitutional as not affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. Mendoza in 1947 had been convicted following a plea of guilty to evasion of his military service obligations under Section 11 of the Selective Training and Service Act of 1940.[55] He served one year and a day. Subsequently, the present deportation proceeding began under Section 401(j) of the Nationality Act of 1940.[56] Mendoza had dual nationality as his parents were natives of Mexico.

A companion case with *Mendoza-Martinez*, consolidated on appeal, was *Rusk v. Court*.[57] Court had no dual nationality and had

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[50] Ungo v. Beechie, 311 F. 2d 905 (9th Cir. 1963); Cahook v. Johnson, 273 F. 2d 413 (5th Cir. 1960); *In re* Harispe, 200 F. Supp. 267 (D. Md. 1961); *In re* Estevez, 189 F. Supp. 705 (E.D. Pa. 1960).

[51] United States v. Cannon, 288 F. 2d 269 (2d Cir. 1961); *In re* Rego, 289 F. 2d 174 (3d Cir. 1961); *In re* Krummenacher, 202 F. Supp. 781 (N.D. Calif. 1962).

[52] *In re* Prieto, 289 F. 2d 12 (5th Cir. 1961).

[53] Ramasauskas v. Flagg, 309 F. 2d 890 (7th Cir. 1962).

[54] 372 U.S. 144 (1963).

[55] 54 Stat. 894 (1940), as amended, 50 U.S.C. App. § 311 (1946).

[56] 66 Stat. 267 (1952), 8 U.S.C. § 1481(a)(10) 1958).

[57] 372 U.S. 144 (1963). Compare Perez v. Brownell, 356 U.S. 44 (1958) which by a 5–4 decision held that Section 401(e) of the Nationality Act of 1940 providing for loss of nationality by voting in a foreign election was constitutional. For a 5–4 holding that a deserter during wartime was not expatriated as the statute of expatriation was unconstiutional, see Trop v. Dulles, 365 U.S. 86 (1958).

registered under the Doctor's Draft Act of 1951.[58] He had been a member of the Communist Party at Yale University from 1946–1951. In 1953, Court was directed by his local board to report either in Massachusetts or in Frankfurt, Germany for physical examination in connection with military service. Court did not appeal and was indicted in 1954 for violation of Section 12(a) of the Act of 1948.[59] Court remained abroad and, upon being denied a passport in 1959, brought the present proceeding for a declaration of his status as a citizen. The Supreme Court upheld his citizenship against divestiture by statute.

IX. MISCELLANEOUS DECISIONS

An injunction will not lie to restrain local board members and the State Director of Selective Service from denying a Conscientious Objector exemption.[60] Neither can declaratory relief in an action for damages be brought against the local board members and employees for an alleged ten years of conspiracy to deny the plaintiff's rights. The board members are protected by the doctrine of sovereign immunity.[61]

A doctor of medicine inducted into the military as an enlisted man, assigned to medical work, is entitled to the pay of a medical officer.[62]

In a prosecution for an offense under the Act, the Selective Service file of a registrant is admissible in evidence as a public document.[63] In a prosecution for unlawful possession of Selective Service registration certificates, the indictment was dismissed where the cards were in blank and bore no writing.[64]

A significant case is *In re Brooks*.[65] This was an original proceeding before the Washington Supreme Court on application to take the bar examination. Permission was denied to the applicant who had been convicted of a violation of the Act in that he refused to report to war-time labor or a work camp for Conscientious Objectors and had served 22 months of a three years prison term.

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[58] 64 Stat. 826 (1950), 50 U.S.C. App. § 454 (1958).
[59] 62 Stat. 622 (1948), 50 U.S.C..App. § 426(a) (1958).
[60] Sorensen v. Selective Service System, 203 F. Supp. 786 (S.D. Pa. 1962).
[61] Coch v. Zuieback, 194 F. Supp. 651 (S.D. Calif. 1961).
[62] Belsky v. United States, 290 F. 2d 593 (Ct. Cl. 1961) (the doctor was both a general registrant and a special registrant under the so-called Doctor's Draft, 64 Stat. 826 (1950), as amended, 50 U.S.C. App. § 454(a–e) (1958)).
[63] Yaich v. United States, 283 F. 2d 613 (9th Cir. 1960).
[64] United States v. Naughten, 195 F. Supp. 157 (N.D. Calif. 1961).
[65] 57 Wash. 2d 834, 355 P. 2d 840 (1960), *cert. denied* 365 U.S. 813 (1961).

The State Supreme Court concluded that the applicant was not of "good moral character" and was not impressed that a matter of alleged conscience was involved in the Selective Service infraction.

X. CONCLUSION

The litigation under the Universal Military Training and Service Act in time of peace and involving alleged Conscientious Objectors and ministers of religion has been very extensive and costly. At first glance one might conclude that the result is not worth the effort and expense of resisting ill-founded claims to exemption under the Act in these classifications. For the very reason that we now are in a period of comparative peace, however, it becomes necessary to scan closely all claims for exemption from military service. Otherwise, in time of war or great national emergency, the machinery of Selective Service might not adjust quickly to increased numbers of exemption claims as military service comes closer to the ordinary man. It should be borne in mind that from the earliest colonial beginnings of America, it has been the practice over the years to allow an exemption from the military obligation to men whose consciences are obstructed by the necessity to undertake military service. In an Act of 1684, the General Assembly of New York in providing for compulsory military service excused those persons "pretending tender Consciences" who were required to furnish a man to serve in their stead or to pay fines.[66]

An indication of the successful operation of the Act is the careful consideration extended to all claimants for exemption even where the purpose to avoid military service may seem unreasonable.

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[66] Vollmer, *Military Obligation: The American Tradition, New York Enactments*, Selective Service, Vol. II, pt. 9, mon. § 1.

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AUTOMATIC DATA PROCESSING AND THE JUDGE ADVOCATE GENERAL'S CORPS.* Programmed utilization of automatic data processing systems by the U. S. Army will eventually extend to all levels of command and management. The integration of certain judge advocate requirements within these systems stand to benefit the Corps. At the same time, widespread use of ADPS throughout the Army establishment will affect judge advocate responsibilities and operations. The Judge Advocate General's Corps must be ready to respond to and, where appropriate, take advantage of the introduction of electronic equipment.

I. UTILIZATION OF ADPS BY THE ARMY

A. *FIELD ARMY*

By 1970, the Army plans to employ ADPS extensively at the field army level. This program is known as "Command and Control Information System—1970 (CCIS–70)."[1] Its objective is to develop appropriate systems to provide automatic data processing of functions in operational areas of interest to the tactical commander. Five sub-systems are proposed to cover the following operational areas: operation centers, fire support, intelligence, logistics, and personnel and administration. Each of these systems will include a suitable number of inter-connected computers, with remote input-output and display devices as necessary, located at various echelons throughout the field army. Input devices will be provided at the lowest feasible echelon. Controlling tactical and administrative support facilities located at field army, corps, and division are the focal points of the integrated CCIS–70.

Of direct concern to the Judge Advocate General's Corps is the personnel and administration data system proposed for the field army. Development of this system has been the responsibility of The Adjutant General's Board, U. S. Army.[2] Preliminary

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[1] Dep't of Army letter, AGAM–P 413.51 (4 Dec 61) DCSOPS, subject: Command and Control Information System—1970 (Jan. 3, 1962).

[2] This responsibility has now been assumed by The Adjutant General's Combat Developments Agency.

studies prepared by this Board[3] indicate that the goal of the system is to eliminate or greatly reduce all manual record keeping in the field army and substitute record manitenance by electronic means. "Hard copy" records, such as morning reports, will be eliminated. The Board recognizes that the system "envisions certain techniques and procedures that are contrary to existing law," but "it is assumed that enabling legislation will be enacted."[4]

It is anticipated that the system will be designed to provide the following information in support of the administration of military justice:[5]

(1) Notification to the Staff Judge Advocate of personnel held in arrest or confinement for more than a predetermined number of days.

(2) Information as to the status of all charges preferred to satisfy the requirement that pending court-martial cases be reported weekly to the convening authority.

(3) Statistical data required for periodic personnel reports, such as numbers and types of court-martial cases on hand, etc.

(4) A computer print-out of the individual's military record, as maintained in the field army, when required.

It is *not* contemplated that the field army data system will be concerned with the judicial process of courts-martial, or with nonjudicial punishment, legal assistance, claims or war crimes.[6]

With regard to the development of automatic data systems for the field army, the Judge Advocate General's Corps must be concerned with the following matters:[7]

(1) The elimination of certain hard copy records, thus affecting the area of documentary evidence.

(2) The maintenance of sufficient information relative to the individual to enable commanders and staff judge advocates

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[3] ADPS Study AGCCD 59–1, *Personnel Record Keeping in the Field Army*, The Adjutant General's Board (Dec. 31, 1959); ADPS Study AGCCD 61–10, *Personnel Management in Support of the Field Army—Personnel Information Requirements for all Arms and Services*, pts. I, IV, The Adjutant General's Board (Aug. 5, 1961). These studies are in the process of republication but will be essentially unchanged.

[4] *Foreword* to ADPS Study AGCCD 59–1 (Change No. 1, 25 March 60), *op. cit. supra* note 4.

[5] ADPS Study AGCCD 61–10, pp. 19–22, *op. cit. supra* note 4.

[6] *Id.* at 2.

[7] Letter from The Judge Advocate General's School, U.S. Army, to Commanding Officer, U.S. Army Combat Service Support Group, May 24, 1963, subject: Review of Command Control Information Systems 1970 (CCIS–70).

to make informed decisions when administrative or disciplinary action with respect to an individual is required.

(3) The maintenance of adequate information to enable trial and defense counsel to prepare court-martial cases.

(4) Utilization of appropriate data systems by the Staff Judge Advocate to maintain essential statistics and prepare required reports in his own areas of interest.

B. *CONTINENTAL UNITED STATES*

1. *Headquarters.*

Utilization of ADPS by The Deputy Chief of Staff for Personnel and The Adjutant General, for the management of officer personnel and the maintenance of their records, is well known.[8] Based upon the evaluation of a prototype ADP personnel system installed at Headquarters, Fourth United States Army, the Secretary of Defense approved the installation of computers at all CONUS Army Headquarters to support the Army personnel and manpower management system.[9] Although the prototype was proposed and approved primarily to support the personnel system, the over-all concept provides for the computers to be used in support of data processing requirements for other areas of application when not required for personnel data processing. The installation of a new "Automatic Digital Network" (AUTODIN) for communications, in place of the current transceiver network, will increase the system's capabilities. The record on each officer now contains 500 items of information. This will be expanded to approximately 2,000 items on each officer's magnetic tape record.[10]

2. *Posts.*

Adoption of ADPS at the post level also is under consideration. A Department of the Army team studied data processing activities at Fort Meade, Maryland, and Fort Jackson, South Carolina, and concluded that integration of ADPS at Class I installations is both feasible and desirable.[11] Computer service would be extended to smaller posts where the workload does not justify location of a computer. ADPS would then be accessible at almost every level of the Army.

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[8] See, *e.g.*, ARMY REGS. No. 330–17 (Nov. 30, 1961).
[9] See Army Personnel Letter No. 2–63 (February 1963).
[10] See Army Personnel Letter No. 7–63 (July 1963).
[11] DEP'T OF ARMY, PAMPHLET No. 1–250–3, § II, ch. 5 (April 22, 1958).

C. *HEADQUARTERS, DEPARTMENT OF THE ARMY*

In December 1961, the Chief of Staff approved the AUTOPROBE concept and, in January 1962, established the AUTOPROBE Committee for the purpose of expediting the project.[12] AUTOPROBE is the designation given to the automatic data processing system serving Headquarters, Department of the Army. Its objective is to provide the Army staff with information and data required for planning, programming, budgeting, resource management, and command and control.[13] The facilities serving AUTOPROBE are those of the U.S. Army Data Services and Administrative Systems Command.

Because of the need for controlled and orderly development of integrated information systems, the Chief of Staff established the Office of the Special Assistant for Army Information and Data Systems.[14] This office will be initially responsible to, and located under, the Vice Chief of Staff. Its mission was to develop, by 15 October 1963, a concept and organization for centralized direction and control over integrated Army information and data systems procedures and eventually provide centralized policy development, supervision over systems design and equipment selection, and allocation of resources.

II. IMPLICATIONS FOR JUDGE ADVOCATES

The foregoing discussion was intended not only as a brief summary of the development and application of ADPS within the Army, but also to indicate areas of interest to the Judge Advocate General's Corps. These new systems of record keeping have numerous legal implications. Many hard copy records, such as morning reports, pay records, property issue slips, etc., will be eliminated. The effect upon the best evidence, official record and business entry rules requires continuous examination.[15] Procurement regulations may require modification to allow use of computers by contractors. A determination must be made as to what type of record is desired in response to a subpoena duces

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[12] Chief of Staff Regs. No. 15–15 (Jan. 22, 1962).

[13] Dep't of Army Letter, AGAM–P(M) (26 Feb 63) COMPT–M (DPS), Hq DA, subject: AUTOPROBE Annual Report (March 8, 1963).

[14] Chief of Staff Memorandum No. 63–58, file CS 320, subject: Army Information and Data Systems (July 15, 1963).

[15] It is understood that the Military Justice Division, Office of the Judge Advocate General, Department of the Army, has prepared proposed changes to the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, to provide for the admissibility of ADPS records and printouts.

tecum. Who is the actual custodian of information stored in a computer is subject to question, as well as who should certify the correctness of information produced by a computer system. Many other problems will be created when fully integrated ADPS throughout the Army becomes a reality. Not only must adjustments be made to accommodate the elimination of certain records, but action must be taken to insure that required documentation is maintained. It is essential that the judge advocate be knowledgeable of data processing systems in order to respond to the needs of command, and that military law keep abreast of new developments.

The Judge Advocate General's Corps also should prepare to utilize and benefit from automatic data processing. The Personnel Division Office of the Judge Advocate General, now participates in the use of ADPS in the field of personnel management and record keeping. Such use might be extended to include, for example, workload studies to better determine the allocation of personnel to various activities. Required reports now prepared manually might well be prepared through data processing. Even more important, certain reports and analyses not previously available because of the time and effort which would be required can now be made available. A study, through ADP, of types of offenses, results of trials, sentences, etc., in comparison with information concerning the accused, could be quite revealing. Application to the field of claims appears desirable. A well designed program could provide current data concerning claims, processed and paid by types, at all echelons of command.[16] It appears that ADPS could be used by the Lands Division to maintain records on land under the jurisdiction of the Government. It is understood that the records of these land transactions now fill some 900 file cabinets. ADPS is an effective tool for compiling and correlating information in large scale investigations and in "big" cases, involving large numbers of documents or depositions. In this regard, a program should be devised for the compilation of data and maintenance of records on war crimes, and individuals suspected of war crimes, when required by conditions existing within a particular theater of operations. Other applications of benefit to the Corps would undoubtedly be found by fully exploring the field.

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[16] Arrangements are being made by the Chief, U.S. Army Claims Service, Office of the Judge Advocate General, Department of the Army, to process reports required by the Federal Tort Claims Act and the Military Personnel Claims Act on computers used by the Finance Office at Fort Holabird. It is considered, however, that claims reporting could be extended to an Army-wide system.

Perhaps the chief benefit which the Corps may realize from computers, however, lies in the area of legal research. In view thereof, the balance of this discussion concentrates on that possibility.

III. LEGAL RESEARCH BY COMPUTER

A. *THE NEED*

1. *Volume of Materials.*

Numerous articles have been written and speeches given concerning the mounting flood of legal reference material, the inadequacy of our present indexing methods, and the resulting difficulties attendant to legal research which face the legal profession.[17]

It has been determined that there are approximately two and one-third million reported cases and one and one-half million statutes,[18] together with an untold number of administrative agency regulations.[19] Each year about 25,000 new opinions are published, along with 29,000 new statutes.[20]

2. *Uncertainty of Manual Research.*

The enormous increases in legal reference material have overtaxed the traditional indexing systems, which are being stretched

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[17] The over-all problem is well stated by Robert A. Wilson of the Southwestern Legal Foundation. See Wilson, *Computer Retrieval of Case Law*, 16 S.W.L.J. 409 (1962).

[18] *Ibid.*, quoting Vincent Fiordalisi, Law Librarian, Rutgers University School of Law.

[19] In this regard, John Lyons points out that the *Federal Register* has published about 300,000 pages containing many hundreds of thousands of entries; about two million subject index entries and more than one and one-half million numerical index entries have been published to assist in the use of the *Daily Register;* as for the *Code of Federal Regulations*, more than one quarter million amendatory provisions have been reported in more than 700 books, and more than two million index terms have been created and published to assist the users of this code. Lyons, *New Frontiers of the Legal Technique*, 62D M.U.L.L. 256.

[M.U.L.L. (*M*odern *U*ses of *L*ogic in *L*aw) is the newsletter of the ABA Special Committee on Electronic Data Retrieval, published quarterly (March, June, September and December) in collaboration with Yale Law School.]

[20] Wilson, *supra* note 18. A monograph entitled "Automatic Retrieval of Legal Literature: Why and How," prepared in 1962 by Allen, Brooks and James for the Walter E. Meyer Research Institute of Law, illustrates in graph form the growth of legal literature of all types. For example, the number of items in the Law Library of the U. S. Library of Congress increased from approximately 100,000 in 1900 to 950,000 by 1958.

to cover factual situations and new fields of law unthought of ten years ago. Complicating the situation are the relatively inflexible, hierarchical indexes used in most digests. Once a classification system has been established and numbers have been assigned to subtopics, the system tends to become stratified. The fact that each new decision must be boiled down to fit into a predetermined pigeonhole requires the digester either to leave out those portions of the case for which no pigeonhole exists, or to squeeze them into a preconceived mold. This inevitably results in a distortion of the source material. Different indexing systems are used for separate digests or compilations, requiring the researcher to adjust his terms of reference as his search takes him from one source to another. And if he does not think in the same terms as the indexer or classifier, a formidable barrier exists between him and the basic material. Further complicating the lawyer's research efforts is the fact in most conventional index-digests the headnotes state only the legal principles involved in the case. The factual background which makes the case relevant to a particular problem is usually omitted.[21]

3. *Advantages of Automatic Research.*

Many advantages are anticipated from the automation of legal research. Provided all relevant documents have been stored, the lawyer need go to only one source for his research. All materials of interest can be searched simultaneously, rather than through a series of indices and digests. The lawyer need be familiar with only one indexing or search system. Searches can be made much faster, relieving the lawyer of much drudgery and non-professional activity. A wider range of materials can be examined for pertinency and no materials will be overlooked, resulting in a better quality of professional work. Automation also can provide an opportunity to retrieve cases according to their fact similarities, as well as on the similarities of their legal issues.

It may be argued that the problem facing the civilian attorney does not apply to the judge advocate; that the military lawyer's work is more stereotyped; that he knows rather specifically what precedents and authorities are applicable in his particular field. But such arguments are more specious than true. Today the

[21] Current problems in legal research have grown to the point that it has been suggested to Congress that it should support and encourage the development of computer techniques for conducting legal research. See the statement of Roy N. Freed, "The Government's Role in the Computer Revolution," before the House Subcommittee on Census and Government Statistics, 13 June 1963.

interests and responsibilities of the judge advocate cover all fields of law, almost without exception. And, in addition, he has other responsibilities not ordinarily faced by the civilian lawyer, *e.g.*, the field of military justice. The following comment by Vincent P. Biunno may apply as well to the judge advocate as to his civilian counterpart:

> With each passing year we pile up decision on statute on rule on regulation and then construct large and cumbersome digests, compendiums, indexes and other archeological devices which we hope will help us find what we want in the ever-growing mound . . . . Ask any judge writing an opinion, or a lawyer writing a brief, whether he can really say he had the time to look for, find, analyze and apply every precedent relevant to a point at issue. There is a strong suspicion that the mountain of precedents has grown to such size that legal research ordinarily consists of no more than snatching the first bit of relevant material that can be found and then flying by the seat of the pants.[22]

Even if the computer should serve only to reduce the amount of time spent in legal research, it would be of benefit to the Judge Advocate General's Corps. The Air Force recently conducted a survey to determine the present workload and costs of manual research within that service.[23] An annual legal research workload of 175,000 cases at a total cost of $693,000 was established. In addition to research costs, man-hour costs to establish and maintain existing subject matter indexing for legal research materials amount to approximately $70,000 annually. On this basis, total present annual costs for legal research in the Air Force amount to $763,000. It is assumed that the legal research workload and corresponding cost in the Army would exceed that experienced in the Air Force.

It is not anticipated that institution of computerized legal research would result in a dollar savings as indicated above. Even though the computer can more quickly locate legal materials applicable to a given legal problem than can be accomplished manually, it cannot replace the lawyer who must still analyze the material and apply it to the problem at hand. It would relieve him of much of the time consuming, tedious work of legal research, as now performed, giving him additional time for the more important aspects of his responsibilities.

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[22] Extracted from an address entitled "Progress and New Developments in Electronic Research for the Lawyer" presented at the 1959 annual meeting of the American Bar Association.

[23] RCS: AF–D64 (OT). Results reported in an undated pamphlet "LITE —Supplemental Information," prepared by the Air Force Accounting and Finance Center, Denver, Colorado.

It is considered that automated legal research, in some form, is required by the judge advocate as well as by the legal profession as a whole, and that at some time in the future it will be used in most areas of legal research. It is generally conceded that the equipment or "hardware" to do the job is currently available. Although improvements in some areas undoubtedly will be made, legal research can be accomplished with computer systems now in operation. The problem lies in determining the best approach; that is, what we should ask the computer to do for us.

B. *THE EXPERIMENTS*

A great amount of effort is being directed toward possible uses of computers by the legal profession.[24] In general, experimentation in the field of electronic legal research has followed two main approaches: automated searching of material which was manually indexed or abstracted prior to entry into the computer "library," and automated searching of the full natural text of source material which had not been indexed prior to storing in the computer.[25] Examples of the application of computers to legal research are noted briefly in the following paragraphs.[26]

1. *Searching Indexed or Abstracted Legal Material.*

"Point of Law" approach. Perhaps the simplest concept is the "Point of Law" approach, developed at Oklahoma State University by the late Robert T. Morgan.[27] In essence, this technique is a

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[24] American Bar Association Recommendation No. 27, August 1963, for the continuation of the ABA Special Committee on Electronic Data Retrieval, indicates that law schools of the following universities are conducting research in this field: Denver, George Washington, UCLA, Illinois, Southern Methodist, Texas, University of California at Berkeley, Indiana, Ohio State, Nebraska, Yale and Pittsburgh.

[25] For discussions of the experiments in legal research by computer, see generally Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, 28 LAW & CONTEMP. PROB. 5 (1963); Eldridge and Dennis, *The Computer as a Tool for Legal Research*, 28 LAW & CONTEMP. PROB. 78 (1963).

[26] This discussion will not attempt to describe in detail how the various approaches to automated legal research actually work. To do so adequately would require several hundred paragraphs. It is intended to give only an indication as to the direction taken by different approaches to the problem.

[27] Morgan, *The Point of Law Approach*, 62M M.U.L.L. 44. Morgan, a professor of business law, had previously been a pilot with the U. S. Air Force. In October 1958 he unsuccessfully proposed to the Air Force Judge Advocate General that computers be used for storing and retrieving court-martial records and other military law materials. "This is believed to be the first detailed statement of a system for computer storage and retrieval of a complete body of law." 62D M.U.L.L. at 268.

mechanization of the conventional indexing method, with some added advantages in searching. Each case or legal document is analyzed to determine the legal issues decided or covered. Code numbers are assigned to each point of law or concept, and the legal materials are recorded on magnetic tape under the appropriate code number or numbers. When a field of law has been analyzed, a directory is prepared listing all points of law in alphabetical sequence and indicating the code numbers corresponding to each legal concept. To obtain material under this system, the attorney must analyze his problem to determine the points of law involved. These points or concepts are then checked against the alphabetical listing to determine the corresponding code numbers. The computer then conducts a search for stored legal materials based on these code numbers.

This approach is essentially an automated West Key Number type system. In addition to its speed in locating stored materials, it has one other major advantage over conventional manual methods of legal research. It is capable of searching for numerous concepts at one time, whereas in manual searching each aspect of a problem must be researched individually. Also it has an advantage over some of the other computerized systems in that it uses concepts and terms with which lawyers are already familiar. However, it has the limitations and disadvantages of all systems that rely on manual indexing or abstracting.

"Concepts of Decision" approach. An apparent adaptation of the "Point of Law" approach has been instituted at the Federal Trade Commission.[28] Commission, Circuit Court, and Supreme Court cases are briefed into their main "Concepts of Decision." Each concept is given a number and is followed by a list of citations to decisions in which it is the law of the case. The searcher analyzes the facts of his case and requests the law by Concept Number. Machines search out the numbers and print out the case citations. In addition, each commodity is numbered and followed by citations to cases ruling on violations involving that commodity. Thus the searcher can also obtain citations to cases with facts similar to his case by requesting a machine search of Commodity Numbers.

"Descriptor System" approach. Another system based on prior manual indexing or abstracting was developed by John C. Lyons, at the Graduate School of Public Law, George Washington

[28] See 63M M.U.L.L. 43.

University.[29] Documents in the file are indexed manually in more depth than in the "Point of Law" approach, by what is termed a "descriptor system." That is, all information which may have a search value is extracted from the document. This may include facts, points of law, commodities, authors or judges, etc. The computer is programmed to apply an association factor to each term used in a search of the file. In this manner other terms found to have some relevancy are automatically employed in the search of the file. As a result, the system has the capability of finding pertinent documents even though they were not indexed by the terms of the search request and, in addition, can list such documents in a probable order of relevancy to the search request.[30]

"Semantic Coded Abstract" approach. One of the most complicated approaches to computerized legal research was undertaken at the Western Reserve University Center for Documentation and Communication. A "Semantic Coded Abstract" system was first developed in preparing metallurgical literature for electronic search. This system was then adapted to legal documents on an experimental basis.

Searching is carried out by computer, using an index prepared from the original text by analysts; however, the indexing method is not conventional in that an artificial language is employed. In general, predetermined codes representing various generic aspects are substituted for the original words abstracted from the text. The methods used would be difficult to explain in a few paragraphs and no attempt is made to do so here.[31] It is noted, however, that

[29] This system was described in a paper entitled "A Search Strategy for Legal Retrieval," distributed at the American Bar Association Annual Meeting, August 1962. See also, Lyons, *New Frontiers of the Legal Technique*, 62D M.U.L.L. 256, and articles by Loevinger and Eldridge, *supra* note 26.

[30] In addition to this project at George Washington University, Mr. Lyons is in charge of the Legal Reference and Data Retrieval Unit established in the Antitrust Division of the Department of Justice. This unit publishes a legal index named "LEX" for use within the Antitrust Division. LEX is a semi-automated index of documents originating within the Division, but is designed so that it may be fully computerized and extended to include other legal materials. A descriptor index system is employed and the full text of the documents is maintained on microfilm. This system is described in articles by Lyons (*supra* note 30) and Loevinger (*supra* note 26). Mr. Lyons also is an associate/advisor to the American Bar Association Special Committee on Electronic Data Retrieval.

In a memorandum dated 20 December 1962, subject: "Preliminary Report, Automatic Data Processing and the Judge Advocate," Lyons outlined possible uses of ADPS by the Judge Advocate General's Corps.

[31] For detailed descriptions of the WRU approach, see Melton and Bensing, *Searching Legal Literature Electronically: Results of a Test Program*, 45 MINN. L. REV. 229 (1960); Melton, *The Semantic Coded Abstract Approach*, 62M M.U.L.L. 48. See also Loevinger and Eldridge, *supra* note 26.

because of technical nature of the system and the requirement for highly skilled analysts, it costs approximately $6.50 to prepare the abstract of one document.[32] This approach, therefore, is considered impractical when applied to a large body of documents, as would be involved in just one field of the law.

2. *Searching Full Natural Text.*

"Key Words in Combination" approach. John F. Horty developed what he termed the "Key Words in Combination" approach at the University of Pittsburgh Health Law Center.[33] This system evolved from an attempt to overcome specific research problems in statutory law, rather than experimentation in computerized legal research as such.

In contrast to previously described systems, source materials are not manually indexed, abstracted, or pre-coded. The full text of each document is placed on magnetic tape. The computer then creates an alphabetical list of every word used in each document, eliminating some 112 common words such as "the," "and," etc., which have no intrinsic search value. The exact location of each word in each document is identified by the computer. This alphabetical list is then used to frame search requests. The researcher determines what key words, or combinations of words, would likely be used in documents which would have relevancy to his problem. The search of the document file is then conducted by the computer, based on these words, and citations to or full text of relevant documents are printed out upon request.[34]

It might be noted that this system apparently is the only one which has been tested against manual research to determine its

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[32] Hayden, *How Electronic Computers Work: A Lawyer Looks Inside The New Machines*, 62J M.U.L.L. 112.

[33] Mr. Horty is director of the Health Law Center and also chairman of the American Bar Association Special Committee on Electronic Data Retrieval.

[34] A complete detailed description of this system, how it was prepared, and how it works is contained in the following reports, entitled "Searching Statutory Law by Computer," submitted by the Health Law Center to the Council on Library Resources pursuant to grant CLR–142; Interim Report No. 1 (undated); Interim Report No. 2 (May 1, 1962); Final Report (Nov 12, 1962).

For some technical aspects of this approach, see Fels and Jacobs, "Linguistic Statistics of Indexing" (mimeo report), 31 July 1962; Kehl, Horty, Bacon and Mitchell, *An Information Retrieval Language for Legal Studies*, 4 COM. OF ASSOC. FOR COMPUTING MACH. 380.

See generally Horty, *The Key Words in Combination Approach*, 62M M.U.L.L. 54; University of Pittsburgh Health Law Center, *Searches of Law by Computer* (August 1962); articles by Loevinger and Eldridge, *supra* note 26.

conparative efficiency. In one instance, research of six legal problems was conducted by the computer and separately by law professors. The computer searches produced more than twice as many references deemed relevant by the researchers as the manual searches (177 to 72), and the manual searches produced only two references missed by the machine.[35]

Since under the Pittsburgh system documents are recorded in full text, it lends itself to other practical applications. For example, it was used to prepare a collation of the Welfare Laws of Pennsylvania.[36] In another instance, it assisted in the drafting of legislation. Pennsylvania statutes variously prescribe that the fiscal year begins on "1 July" and "the first Monday in July." Legislation was being drafted to change the fiscal year in all instances to 1 July. By having the computer search for all statutes using the words "first," "Monday," and "July," in that order, all statutory sections to be amended were retrieved.[37] Either of these actions would have posed considerable problems in time and cost if performed manually.

One of the computer programs enables the printout of selected words in the context in which they are used. For example, a study was to be made of the use of the phrase "good faith" in Pennsylvania statutes. Each occurrence of the phrase was printed out by the computer, with several words appearing on either side of the phrase and the citation of the document in which the phrase occurred.[38] This computer program could be particularly useful in drafting legislation, to be certain that words are used consistently.

The Pittsburgh project is probably the most extensive one yet undertaken. They now have on tape, available for research by computer, the complete laws of the United States, the complete statutes of New York and Pennsylvania and the statutes dealing with health in eleven other states, the Pennsylvania Attorney General's opinions dealing with education, and the New Jersey court rules, rules of evidence and constitution. To date, however, they have not tried automated legal research of judicial decisions.[39]

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[35] Horty, *supra* note 35. For a more complete analysis of this and other comparative tests, see Interim Report No. 2, *supra* note 35.

[36] Springer and Horty, Searching and Collating the Welfare Laws of Pennsylvania by Computer (Health Law Center, September 1962).

[37] Horty, *supra* note 35.

[38] For a law review note prepared on the basis of this printout, see Hatch, *Good Faith Under the Uniform Commercial Code*, 23 PITTSBURGH L. REV. (1962).

[39] In a recent conversation with the writer of this report, Mr. Horty indicated that research of case law would be tested at the Health Law Center in the near future.

"Root Index File" approach. An approach to research in the case law field, similar to the "Key Words in Combination" approach to statutory retrieval, has been undertaken by the Southwestern Legal Foundation under the direction of Robert A. Wilson, Vice President and Director of Research.[40] Source material, consisting of approximately 250 Federal court decisions dealing with taxation of oil and gas transactions and 200 State and Federal appellate court decisions in the field of arbitration, have been placed on tape in full text. Certain modifications of the "Key Words in Combination" system were made, the principal one being the preparation of a "Root Index File." All words occurring in the natural text are given a root index number and various forms of a given word are collected under a given root term. Thus, the words "appeal," "appeals," and "appealed" would be assigned a single numerical code. Searching is done on the basis of root index numbers, rather than by words, as in "Key Words in Combination" system. This serves to shorten the concordance of search words and reduces computer search time. There is no indication, however, as to how well this system works in actual practice in comparison with manual research.

Project LITE. The Air Force Accounting and Finance Center at Denver, Colorado, has proposed that a pilot test be conducted to determine the feasibility of performing legal research by computer within the military establishment.[41] This project, known as LITE (*L*egal *I*nformation *T*hru *E*lectronics), is patterned after the system developed at the Health Law Center, University of Pittsburgh.

The scope of the project will be limited primarily to legal research in the field of financial management. As source data for conduct of the test, the full text of the following materials will be placed on magnetic tape: the *United States Code,* pertinent Executive Orders, and Comptroller General Decisions applicable to the financial management of military funds.

It is anticipated that the project will be completed within approximately one year after it is initiated. The first six months will be utilized in preparing the data base, systems design and initial programming. During the second six months the system will be tested and programs refined.

The system will be designed to provide citations, full text, and words or phrases-in-context in response to a search request. To

[40] Wilson, *Computer Retrieval of Case Law,* 16 S.W.L.J. 409 (1962).

[41] Letter, Headquarters Air Force Accounting and Finance Center, subject: LITE (20 Aug. 1962), and attached pamphlet.

evaluate the system, it is planned to conduct three word or phrase-in-context searches and fifteen subject matter searches per week during the six-month test period. In addition, five citation searches per week will be conducted during the first three months of the test period. Thus a total of 533 searches will be conducted for test purposes. The results of these computer searches will be compared against manual searches of the same research problems in order to evaluate the effectiveness of the automated research system.

3. *Eliminating Manual Indexing and Abstracting.*

There are differences of opinion as to the best approach in adapting the computer to legal research, *i.e.*, whether or not documents should be manually indexed or abstracted prior to entry into the reference file. The strongest arguments appear to be against such procedures.[42] Automated systems of legal research which rely on prior abstracting or indexing of documents seem to perpetuate, in many respects, the difficulties and shortcomings inherent in our present methods of organizing and storing legal reference material. In essence, the researcher must think in the same terms as the indexer if he is to find references pertaining to the problem at hand.

Abstracting or indexing of documents requires an inordinate amount of time and a high level of talent. The digest necessarily depends upon the ability and insight of the person doing the abstracting. Even so, no two human minds can be reliably counted upon to consistently make the same decisions as to what material is to be included or what words are to be selected for the abstract or index. Inevitably there is a loss of information in going from the document to the condensation or classification of the document.

On the other hand, search of complete natural text, without prior manual indexing, requires much more complicated computer programs and more computer time. The researcher must determine the language or words that would probably be used in documents which pertain to his problem. And, although a high level of talent is not required in preparing documents for research,

[42] For discussions of this problem, see Eldridge and Dennis, *The Computer as a Tool for Legal Research*, 28 LAW & CONTEMP. PROB. 78 (1963); Wilson, *Computer Retrieval of Case Law*, 16 S.W.L.J. 409 (1962); Hoffman, *Lawtomation in Legal Research: Some Indexing Problems*, 63M M.U.L.L. 16; Horty, *The Key Words in Combination Approach*, 62M M.U.L.L. 54; Lyons, *New Frontiers of the Legal Technique*, 62D M.U.L.L. 256; Allen, Brooks and James, *Automatic Retrieval of Legal Literature: Why and How*, Meyer Research Institute of Law (1962).

a great amount of time is required in entering the full text of reference material in the computer library.

Recognizing that problems connected with the utilization of computers for legal research have not been solved, further experimentation is being conducted. Notably, attempts are being made to circumvent manual abstracting or indexing by devising computer programs to accomplish this task electronically.

A study of machine indexing of court decisions has been undertaken by the Systems Development Corporation.[43] The whole text of California Supreme Court decisions in labor law and arbitration will be analyzed by computers and several types of indexes will be prepared—a straight index, a concordance, a digest, and an encyclopedia. These indexes will then be compared and evaluated.

An even more ambitious program, and one which may well be decisive in the field, has been instituted by the American Bar Foundation.

4. *Joint American Bar Foundation—IBM Study.*

In 1961 the American Bar Foundation approved a research project entitled "Legal Research Methods and Materials."[44] An offer from IBM to contribute technical assistance was accepted and the Foundation formed a study team composed of representatives from both organizations. William B. Eldridge of the Foundation was designated project director.

One aim of the project is to develop and improve methods of legal research as they apply to state statutes,[45] and another is to examine electronic methods of information retrieval and indexing, wherever they might apply to legal research problems.

The team decided that the major uninvestigated technical hurdle to handling large volumes of legal material automatically is indexing and file organization. In May of 1962 it was determined that an eighteen-month technical study should be conducted in an

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[43] Adams and Cambillo, *Data Processing and Law*, 5 SDC Magazine 1 (1962); see 62D M.U.L.L. 238.

[44] See 62J M.U.L.L. 103; 63M M.U.L.L. 27.

[45] Based on recommendations of the ABF-IBM team, the ABF approved two applications of IBM's Keyword-in-Context system. One application was the indexing, on a current basis, of state legislation. Commercial publication of this index, by the ABF and the Bobbs-Merrill Co., began in 1963. The other application was to the ABF publication, *Index to Legal Theses and Research Projects.* The ninth annual edition was published in July 1962, using the KWIC indexing method and photo-offset printing from the computer output.

attempt to solve these problems and to determine the feasibility of establishing a central electronic information service for the legal profession.

The legal material utilized for the experiment consists of the last 5,000 cases, taken chronologically, from the Northeastern Reporter. To determine the best system for the retrieval of legal literature, the following four different methods of file organization and manipulation are to be tested:

(a) Indexing via the key numbers assigned by West Publishing Company.

(b) Indexing by means of a "statement of the issue," to be prepared for each case by human editors.

(c) Indexing by "fact words" taken directly from the text.

(d) Indexing by machine from natural text in a fully automatic system.

To test the four different components of the experiment, a set of about 200 questions will be solicited from practicing attorneys. The questions will be in narrative form, ranging in length from 50 to 250 words. For the first three systems, a member of the study team staff will prepare a search question in the system language from the written narrative. For the fourth system, the computer program will diagnose the original question itself and proceed with the automatic search. The attorneys who submitted the questions also will have their questions searched manually and the results of the various types of searches will be compared. Initial results of the ABF-IMB study team's experiments should be available in the spring of 1964.[46]

During its preliminary study, the joint ABF-IBM team concluded that an automatic searching system should meet the following general requirements.[47] The first category represents the demands that will be made upon an information system by its lawyer users, and the second, the functional requirements of the system that will make it adequate, responsive, and economical.

a. *Goals of the system in terms of legal usage.*

(1) *Fact searches.* The system should provide the ability to search via factual elements. Facts can be utilized in a number of ways to increase search effectiveness and the pertinency of a result. For example:

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[46] Letter from William Eldridge, Project Director, to the author, dated 1 August 1963.

[47] 63M M.U.L.L. 27, 29.

(a) A fact search may sometimes be an end in itself. If a machine search can disclose those cases in which facts are identical to those of the searcher's problem, the result may be dispositive of the issue.

(b) Facts can be used to analyze problems. The output of search for factually identical cases may yield cases that discuss issues not previously recognized by the searcher.

(c) Comparative studies of the treatment of particular problems could be facilitated by fact searches since it would not be necessary to anticipate all the possible grounds upon which courts might have resolved a problem.

(d) Facts can be used to narrow a too large yield from other types of searches. For example, where a researcher is seeking cases under a particular point of law, such as elements in the distinction between employee and independent contractor, and the number of cases revealed is burdensome, facts can be used to rank the cases according to probable pertinency.

(e) Facts can be used as a tool for scholarly research.

(2) *Searches for legally analogous materials.* The researcher needs access to legal reasoning and the factors that produce it. He needs to be able to discover threads of reasoning and policy which permeate decisions of the courts across factual situations and even across many large areas of the law. He needs to be able to gauge his own hypothesis against the written opinions of judges. He needs to be able to assess the weight that will be given to particular aspects of problems. He needs to be able to search by analogy and generically. The team considers this requirement the most important as well as the most challenging part of developing a satisfactory system.

(3) *Informative output.* One of the deficiencies in the present conventional methods of indexing is that the yield of citations does not contain sufficient information so that the researcher can make intelligent choices about which of the original materials to consult. A satisfactory system should have the capability of answering a question with such information as to enable the researcher to make logical choices among citations. Such an answer might include some factual words, an indication of the main issues or concepts, and the determination of the issue.

b. *Goals of the system in terms of functional behavior.*

(1) A guarantee of 100% (or very nearly 100%) return of the citations relevant to a question.

(2) The greatest selectivity that can be realized, once the guarantee of 100% return of relevant documents is met.

(3) No interposition of a human buffer between the user and the system.

(4) No obligation on the part of the user to know the answer to a question in order to ask it, or to know the words in which the answers are couched in order to phrase his question.

(5) Organization (indexing or analysis) of the file executed at minimum cost. This implies minimum human labor, and may imply organization accomplished entirely by machine.

(6) Searching of the file achieved at minimum cost. This implies machine searching.

(7) A growth mechanism built into the system so that as vocabulary and subject matter change with time, the organization and search system automatically adapt themselves to the changes.

(8) Minimum editing of search questions by the system operator.

(9) Citations resulting from searches ranked in order of probable relevancy and supplemented with abstracts of some kind.

The above goals expressed by the American Bar Foundation are not realized by the automated legal search systems in existence today, and perhaps they never will be fully attained. In spite of the apparent success of the programs developed at the University of Pittsburgh, it is believed that large-scale legal research by computer is still in the experimental stage. The additional work in the field, such as that undertaken by the American Bar Foundation, together with new advances in equipment and technology, may provide solutions to many of the current problems.

5. *Psychological Factors.*

One aspect of applying the computer to legal research is psychological and rarely mentioned. A large part of the formal professional education of the lawyer consists of training and exercise in the analysis of problems, the use of a legal vocabulary, and the use of legal index systems. Some of these skills will be of benefit in the use of automated research systems while others may actually be a handicap, psychologically at least. While engaged in research the lawyer gets a "feel" for his case. In browsing through legal references he gradually develops the parameters of the problem at hand. New approaches or concepts may be discovered and pursued. This is not the case with computer research,

where the search process itself is hidden from view.[48] Of course the product of the search may lead to new lines of inquiry upon which to base a subsequent computer search. But, at least among the present breed of lawyers, there will probably always be some doubt as to the adequacy of mechanized search, a feeling, perhaps, that all was not done that should have been done. And of course there will be those who will contend that legal research simply cannot be performed by a computer.[49]

IV. RELATED COMPUTER APPLICATIONS

Other uses of computers which might be of interest to the judge advocate should be mentioned.

At the University of Oklahoma, work is in progress on an adaptation of the Key-Word-in-Context program to catalog the Space Law Collection maintained in the Law Library.[50]

The University of Denver School of Law is compiling a "data bank" of oil and gas law. The first step is to store all Department of Interior decisions affecting land leasing. Eventually all recorded cases in the field of oil and gas law will be stored in the data bank and available for research.

The UCLA Committee for Interdisciplinary Studies of the Law and the Administration of Justice has undertaken, in association with the Systems Development Corporation, an exploratory study of the Superior Court of Los Angeles County to determine the feasibility of data processing support to both the administrative and judicial activities of the Superior Court system.[51]

Several experiments have been conducted in the use of computers to analyze cases and predict judicial decisions.[52]

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[48] John Lyons reports this experience with his work in automation at the Antitrust Division. Some of the attorneys with the Division indicated that they were no longer getting a "feel" for the case as they did with manual research.

[49] At the Second National Law and Electronics Conference at Lake Arrowhead, Professor Rosenberg, professor of law at Columbia, replied to arguments concerning the feasibility of applying computers to the law with the following: "What would have happened," Rosenberg asked, "if Neanderthal man, when he first saw fire, had said to his companion, 'Look at that! That's fire! Now what do we need fire for! Let's stomp it out!'" Rosenberg concluded, "we'd still be eating saber-tooth tiger steaks rare."

[50] See 62D M.U.L.L. 241.

[51] See 62D M.U.L.L. 238.

[52] Lawler, *What Computers Can Do: Analysis and Prediction of Judicial Decisions*, 49 A.B.A.J. 337 (1963); Schubert, *Psychometric Research in Judicial Behavior*, 62M M.U.L.L. 9; Kort, *A Quantitative Restatement of Legal Rules*, 63J M.U.L.L. 87; Lawlor, *Foundations of Logical Legal Decision Making*, 63J M.U.L.L. 98. See also articles in the Winter 1963 issue of LAW AND CONTEMPORARY PROBLEMS.

Computers are being used by the U. S. Patent Office for two types of information searches.[53] Patent case law is indexed and searched by the use of key words. In addition, machine systems are being developed for making novelty searches when processing patent applications. As has been noted: "Whatever can be done in the field of patents can also be done in the field of law." [54] The workload is comparable; there are about 2,500,000 published decisions, and there are approximately 3,000,000 patents. Systems developed for the search of patents may also be applicable to case law research.

One of the largest document retrieval systems is that developed and operated by the Defense Document Center for Scientific Technical Information.[55] Requests for documents from the Center average 3,000 per day and approximately 40 computer searches for stored information are conducted each day. Documents are reviewed and abstracted by analysts, and are identified and retrieved through the use of descriptors. Documents are stored on microfilm and reproduced automatically for dispatch. Many of the programs and procedures developed for this Center might be of value in the establishment of a legal research center.

Automatic data processing is being installed by the Internal Revenue Service and will be fully operational in 1969.[56] Instead of processing each return as a separate item, under ADP the Revenue Service is setting up a separate account for each taxpayer, identified primarily by number rather than by name. A consolidated record is prepared for each taxpayer for different kinds of taxes covering three consecutive years. The computers enable the IRS to conduct extensive cross-checking for the purposing of determining that a reported payment is properly reported by the recipient on his income tax return. In addition the computer will prepare statistical norms for different types of taxpayers and for different items of income and deductions. By programming these norms into the computers, tax returns that vary from the norms can be sorted for detailed auditing.[57]

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[53] Andrews, *Experience with Electronic Searching of U. S. Patents*, 60D M.U.L.L. 168; Newman, *Information Retrieval Research in the U. S. Patent Office*, 60J M.U.L.L. 45.

[54] From a chapter by Reed C. Lawlor, *Information Technology and the Law*, in the book ADVANCES IN COMPUTERS, vol. 3 (1962).

[55] Formerly ASTIA—Armed Services Technical Information Agency.

[56] Freed, *Automation, the Taxpayer and the Revenue Service*, 2 P-H TAX IDEAS REPORT 19,001 (1963).

[57] Freed, *supra* note 56, was reviewed by Professor Morrison, University of Texas School of Law, in 63J M.U.L.L. 71. In his review, Morrison pointed out that the detail of information which is now practicable with ADP—of the

Computers also are being used to check state income tax returns. In South Carolina an electronic system keeps a magnetic file on every taxpayer. The system computes the tax due for every individual, then compares that amount with the figure on each return. If both figures are the same, the computer prints out the refund due or the balance left to pay. If the figures are not the same, the computer prints out a special report. The arithmetic on the face of an individual return can be verified in 47/10,000 of a second.[58]

V. OTHER CONSIDERATIONS

With the Army-wide integrated computer system planned for the future, it would be feasible to have a central computerized legal library. The judge advocate in the field could relay his research query through the nearest computer service center and receive a reply in the same manner. A similar system for the civilian lawyer is envisioned by writers in the field.[59]

No one can predict what may be possible in the future in recording, manipulating, and retrieving data by electronic devices. Judging from the progress in machine technology to date, the information retrieval system of three years from now may be entirely different from the systems in use today.

Progress is being made in the development of "page-readers," which will be able to scan a printed page electronically and convert it to storage on magnetic tape in something on the order of six seconds a page. This will eliminate the laborious and costly process of typing each word by keypunch or flexowriter, as is now done when total text is placed on tape.

However, a study of legal storage and research should not be limited to the feasibility of automatic data processing. Comparison studies should be made of other available methods, such as the "Peek-a-Boo" systems known as Termatrex and Keydex. Utilization of microfilm also should be considered. As has been sug-

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individual, his history, his family, his business, his ownership and management of property, and his transactions with other persons—far exceeds anything which has been available to the tax collector and the government. "Traditional liberties and constitutional protections are jeopardized where comprehensive personnel information and records are permanently on file and immediately available for use by government officials who have been granted broad discretionary powers under the taxing statute."

[58] See 63J M.U.L.L. 82.

[59] Loevinger, *Jurimetrics: Science and Prediction in the Field of Law*, 46 MINN. L. REV. 255 (1961); Satterfield, *Law Practice 1971: Some Foreseeable Effects of Electronic Legal Search*, 32 OKLA. BAR. ASSN. J. 1432 (1961).

gested, the compact nature of microfilm would allow judge advocate officers in the field to carry their entire library in a small container approximately the size of a shoe box.[60] This could well answer the problem of transporting the "combat" library.

A reported technique for the storage and dissemination of micro-documents has made high density document storage feasible.[61] Using this technique, it is possible to record a 300-page book within one square inch of film. A three by five inch photochromic plate can contain 2,625 micro-images and, by reproduction on a micro-image card, the entire contents of eight to ten average size books can be recorded on a three by five inch card. At this rate, all reported judicial decisions and all statutes can be recorded in full text on three by five inch cards in a file approximately 24 inches in depth. Another system can store 30,000,000 documents in micro-image in the space of an ordinary file cabinet. Within one minute, these systems can locate and produce a full size copy of any page in the file. This manner of storage, however, precludes any direct searching of the text and therefore requires an indexing system.[62]

Perhaps a computer generated abstract combined with a photographic negative of the complete document on the same tape may be the ultimate answer. Whatever the form it seems certain that automated legal research will be available, based upon some computer application.

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[60] Lyons memo, *supra* note 30.

[61] Known as the photochromic micro-image technique. See Loevinger, *The Methodology of Legal Inquiry*, 28 LAW & CONTEMP. PROB. at 27 (1963).

[62] National Bureau of Standards Technical Note 157, *Information Selection Systems Retrieving Replica Copies: A State-of-the-Art Report* (December 31, 1961), contains a survey of this type equipment.

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